No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

SENECA NATION OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

STATE OF NEW YORK,

Petitioner,

v.

SENECA NATION OF INDIANS; TONAWANDA BAND OF SENECA INDIANS; and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the continued involvement of the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians in these federal land claim actions against New York State is barred by the Eleventh Amendment because, notwithstanding the intervention of the United States years after the actions were commenced, the actions are not at the instance and under the control of responsible federal officers and thus New York has never consented to them.

PARTIES TO THE PROCEEDING

The Court of Appeals consolidated appeals in two separate Indian land claim actions. In the first action (the "Cuba Lake action"), the petitioners are the defendants State of New York; George E. Pataki, Governor; Joseph Seymour, Commissioner of the Office of General Services; and Bernadette Castro, Commissioner of Parks, Recreation and Historic Preservation. In the second action (the "Grand Island action"), the petitioner is the defendant State of New York. The respondents in the Cuba Lake action are the plaintiff Seneca Nation of Indians and plaintiff-intervenor United States of America. The respondents in the Grand Island action are the plaintiff Seneca Nation of Indians, plaintiff-intervenor Tonawanda Band of Seneca Indians, and plaintiff-intervenor United States of America.

Not participating in the appeal of the Cuba Lake action in the Court of Appeals were the individual defendants Frederick W. Tapp, Jane E. Schuck, Kent Sandford, Richard J. McCutcheon, Beverly A. McCutcheon, Albert A. Hoffman, Lucy Hoffman, Myles Barraclough, Sandra Barraclough, Duane G. Glover, Paul H. Geer, Virginia M. Geer, Scott E. Fisher, Rosemary N. Fisher, William E. Campbell, David J. Gibson, Clarence J. Coffman, Jr., C. James Coffman, Sr., Jean Coffman, Eileen W. Garling, Robert F. Van Der Horst, Susan F. Van Der Horst, Joseph Chiapuso, Susan Chiapuso, Howard B. Whitney Estate, Deborah Baldwin, Robert L. Jones, Eugenia Jones, Stephen M. Kane, Clarence J. Coffman, Sr., Howard L. Luzier, Florence Luzier, Walter L. Whitney, Executor, Louise Hickey, Phillip Confer, Shirley Confer, David C. Williams and Frances E. Williams.

Not participating in the appeal of the Grand Island action in the Court of Appeals were defendants New York State Thruway Authority, Erie County, Moore Business Forms, Inc., Inducom, Inc., Rado-O-Mart, Inc., Ilona H. Lang, Robert W. Weaver,

Francis B. Pritchard, and intervenor-defendants George E. Pataki, Bernadette Castro, Ronald W. Coan, John Cahill, Joseph Boardman, and John R. Platt.

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ARGUMENT

Whether the last-minute intervention of the United States in federal district court actions brought by Indian Tribes against New York eliminates the State's Eleventh Amendment immunity regarding the Tribes when the United States asserts the same claims or issues originally asserted by the Tribes is an important question of Federal law that has not been, but should be, settled by this Court 12

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners State of New York, et al., respectfully petition that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 17, 1999. The court held that to the extent that the Seneca Nation of Indians (the "Seneca Nation") and the Tonawanda Band of Seneca Indians (the "Tonawanda Band") raised claims or issues against New York State that were identical to those raised by the intervenor United States, the State of New York has no Eleventh Amendment immunity from suit by the Seneca Nation and the Tonawanda Band.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit of which review is sought is reported at 178 F.3d 95 (2d Cir. 1999), and is reproduced in the appendix at 1a. The underlying opinion of the United States District Court for the Western District of New York in the Cuba Lake action is reported at 26 F. Supp.2d 555 (W.D.N.Y. 1998) and is reproduced in the appendix at 9a. The underlying order of the United States District Court for the Western District of New York in the Grand Island action and the report and recommendation of the Magistrate Judge adopted by such order are unreported and are reproduced in the appendix at 57a and 45a, respectively.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was rendered and judgment entered on May 17,

1999 (1a-8a)[1]. The Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

STATEMENT OF THE CASE

A. The Cuba Lake Action

The Seneca Nation commenced this action in the United States District Court for the Western District of New York in March 1985 against the State of New York (the "State") and its Governor and Commissioner of General Services (Jt App 27-33). It claimed that in 1858, and the years that followed, the State condemned approximately fifty acres of land belonging to the Seneca Nation in the Oil Spring Reservation and thereafter asserted title to such land without the consent of the United States in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177 (11a-13a). Prior to the commencement of the

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[1]Numbers in parentheses followed by the letter "a" are citations to pages in the appendix to this petition for writ of certiorari. Numbers in parentheses preceded by "Jt App" are citations to pages in the joint appendix in the Court of Appeals.

Cuba Lake action, the United States had refused to commence the action itself on behalf of the Seneca Nation (21a).

The Seneca Nation alleged that the State condemned the land for the purpose of constructing a dam to provide water for the Genesee and Erie Canals (13a). It further alleged that by 1892, the State had abandoned the use of the reservoir (known as Cuba Lake) for canal purposes and that thereafter the State divided the shoreland into lots which it leased to private individuals who erected shorefront cottages (15a). The Seneca Nation subsequently added the individual lessees as defendants (12a). The district court's subject matter jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1362, 2201 and 2202 (Jt App 81).

As relief, the Seneca Nation sought a declaratory judgment quieting title in the Seneca Nation to the disputed acreage, an injunction prohibiting defendants from selling, leasing or otherwise conveying the disputed acreage, an accounting of the profits derived by the State from the land during the period of its possession, and judgment for mesne profits from the State's use of the land and damages for the State's trespass and inundation of the land. The Seneca Nation also sought a declaration that the leases of the Cuba Lake lots were void, an order ejecting defendants from the Seneca Nation's lands, and costs and other appropriate relief (11a-12a, 19a-20a).

The State defendants raised a number of defenses, including lack of jurisdiction, on the basis that the Eleventh Amendment precluded plaintiff's action against the defendants (20a).

In August 1994, the parties moved for summary judgment (12a). In August 1997, while the summary judgment motions had been pending for three years, and twelve years after the commencement of the action, the United States moved to intervene. The motion was granted in January 1998 (12a). In

its complaint in intervention, the United States invoked district court subject matter jurisdiction pursuant to 28 U.S.C. §§ 1345, 2201 and 2202 (Jt App 126). The United States alleged that it brought this action for the benefit of the Seneca Nation to enforce the restrictions on alienation of Indian land contained in the Nonintercourse Act and the rights secured to the Seneca Nation by the Treaty of November 11, 1794, 7 Stat. 44 (12a). The United States sought relief virtually identical to that sought by the Seneca Nation (12a, 23a).

In their answer to the complaint in intervention, filed after the issuance of the district court's decision and order, the State defendants alleged, among other things, that the court lacked jurisdiction to adjudicate the tribal plaintiff's claims against the State defendants pursuant to the Eleventh Amendment (Jt App 178-184).

In its decision and order dated October 31, 1998, the district court (Curtin, D.J.) granted the summary judgment motions of the Seneca Nation and the United States and denied the State's summary judgment motion. *Seneca Nation of Indians v. State of New York*, 26 F. Supp.2d 555 (W.D.N.Y. 1998) (9a). The court found as a matter of law that the State violated the Nonintercourse Act when it acquired the disputed lands but reserved decision on questions of remedies and the precise extent of the land at issue (44a).

In its decision and order, the court rejected the State defendants' Eleventh Amendment defense (20a -23a). The court noted that the United States had intervened in the action and that the parties agreed that the State defendants had no Eleventh Amendment immunity from suit by the United States (20a). The court concluded that even if the court were to find the Seneca Nation's claims against the State defendants to be otherwise barred by the Eleventh Amendment, the Seneca Nation would be allowed to intervene in the action brought by the United States

pursuant to *Arizona v. California*, 460 U.S. 605 (1983) (21a-22a). In reliance upon *Arizona* and upon the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd. on other grounds*, ___U.S.___, 119 S.Ct. 1187 (1999), the court stated (23a):

> The Eleventh Amendment protects a State from being hailed [sic] into federal court. Now that the United States is a plaintiff in the instant case, the State is properly before a federal court. The Senecas' and the United States' claims are virtually identical. Allowing the Senecas' claims to proceed does not further compromise the State's sovereign immunity. The interest of judicial economy is best served by allowing the Senecas' claims to continue.

26 F. Supp 2d at 564-65.

The State of New York, the Governor, the Commissioner of General Services and the Commissioner of Parks, Recreation and Historic Preservation appealed as of right to the United States Court of Appeals for the Second Circuit from that portion of the district court's order which denied the State defendants' claims of Eleventh Amendment immunity from suit by the Seneca Nation (Jt App 185-186).

B. The Grand Island Action

In August 1993, the Seneca Nation commenced this action in the United States District Court for the Western District of New York against the State, the New York State Thruway Authority (the "Thruway Authority"), Erie County, and a number of private landowners claiming that certain lands reserved to the Seneca Nation by treaty were taken by the State in violation of the Nonintercourse Act (Jt App 235-249). The land at issue included all the islands in the Niagara River between Lake Erie and Lake Ontario within the jurisdiction of the

United States, comprising over 18,000 acres, including Grand Island, purchased by the State from the Seneca Nation in 1815. In November 1993, the Tonawanda Band moved to intervene in the action regarding the Niagara River islands as a successor-in-interest to the Seneca Nation of Indians as it existed at the time of the State's acquisition of the Niagara River islands (Jt App 261-262). The Tonawanda Band's motion to intervene was granted in early 1994 (Jt App 296-301). Both the Seneca Nation and the Tonawanda Band invoked the district court's subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1343 and 1362 (Jt App 352, 370).

In their answers, the State and the Thruway Authority alleged that the Tribes' claims against them were barred by the Eleventh Amendment. In August 1996, the State moved pursuant to the Eleventh Amendment to dismiss all claims asserted against it (46a, 58a). The non-State defendants also moved to dismiss the claims against them pursuant to Rule 19 of the Federal Rules of Civil Procedure on the ground that complete relief could not be accorded in the absence of the State, an indispensable party (46a).

In October 1997, the Seneca Nation filed its second amended complaint, naming as defendants the State, the Governor, the Commissioner of Parks, Recreation and Historic Preservation, the Commissioner of the Department of Environmental Conservation, the Commissioner of Transportation, the Executive Director of the Thruway Authority, the Thruway Authority, Erie County, the director of the Erie County Industrial Development Agency and a number of private landowners (47a). In its prayer for relief, the Seneca Nation sought declarations that the conveyance of the islands, as well as defendants' interest in and possession of such property, was null and void, a permanent injunction restraining defendants from taking any action interfering with the Seneca Nation's possession of the disputed lands and ejecting defendants therefrom, and damages for the fair rental value of the disputed lands during the period of defendants'

occupancy (Jt App 362-363; 53a). The Tonawanda Band also filed an amended complaint in October 1997, naming the same defendants as the Seneca Nation (47a).

In December 1997, the State official defendants moved to dismiss the amended complaints (47a). Thereafter, in March 1998, the United States moved to intervene, and the motion was granted in April 1998 (47a). In its complaint in intervention, the United States alleged that the State's purported purchase of the Niagara River islands in 1815 was null and void because it did not comply with the Nonintercourse Act (Jt App 527; 49a-50a). The United States sought a judgment awarding damages, with interest, for the benefit of the Seneca Nation and the Tonawanda Band, attorneys' fees and costs and such other relief as the court deemed just and proper (Jt App 528; 49a-50a). The United States invoked the district court's subject matter jurisdiction pursuant to 28 U.S.C. § 1345.

The following month, in May 1998, the State defendants moved to dismiss the complaint in intervention of the United States as time-barred and further argued that, if the United States' complaint was not dismissed, the complaints of the Seneca Nation and the Tonawanda Band should still be dismissed as to the State defendants based on the Eleventh Amendment (47a, 58a).

In her report and recommendation, the United States Magistrate Judge rejected the State defendants' contentions that the complaint of the United States was time-barred (51a), a matter not at issue here, and that the Tribes' complaints were barred by the Eleventh Amendment (51a-53a). With respect to the Eleventh Amendment claim, the Magistrate Judge relied upon *Arizona*, concluding that the differences in relief sought by the United States and the Tribes were not material (52a-53a). The Magistrate Judge held that the court's judicial power over the controversy would not be enlarged by allowing the tribal

complaints to proceed and the State's Eleventh Amendment immunity would not be compromised (53a).

The State defendants objected to the Magistrate Judge's report and recommendation and sought the dismissal of the complaints of the Seneca Nation and the Tonawanda Band against the State and the State official defendants (59a). On November 3, 1998, District Judge Arcara issued his order adopting the findings of the report and recommendation and denied defendants' motions to dismiss (58a-60a).

In December 1998, the State filed its notice of appeal to the United States Court of Appeals for the Second Circuit from the denial of its motion to dismiss the claims of the Seneca Nation and the Tonawanda Band pursuant to the Eleventh Amendment (Jt App 694-695). Thereafter, the United States filed its first amended complaint in intervention, specifically seeking the ejectment of the State of New York and all other governmental defendants from the disputed lands (Jt App 683-693).

C. Proceedings in the Court of Appeals

The Court of Appeals consolidated the appeals for all purposes by order dated January 26, 1999. Subsequently, the Seneca Nation, the Tonawanda Band and the United States moved to dismiss the consolidated appeals for lack of appellate jurisdiction, contending that the collateral order doctrine was inapplicable to these interlocutory appeals. The Court of Appeals denied the motions to dismiss on March 9, 1999. In their briefs on the merits, the Seneca Nation, the Tonawanda Band and the United States renewed their argument that the Court of Appeals lacked appellate jurisdiction.

In a *per curiam* decision dated May 17, 1999, the Second Circuit affirmed the orders of the district court denying New York's Eleventh Amendment defenses "for substantially the

reasons stated by Judge Curtin in the decision below" (4a-5a). *Seneca Nation of Indians v. State of New York*, 178 F.3d 95, 97 (2d Cir. 1999).[2] However, the court noted that the State of New York retained its Eleventh Amendment immunity to the extent that the Seneca Nation or the Tonawanda Band "raise claims or issues that are not identical to those made by the United States," citing this Court's decision in *Arizona v. California*, 460 U.S. 605, 614 (1983) (5a). By reaching the merits of the appeals, the Court of Appeals again rejected the plaintiffs' contention that it lacked appellate jurisdiction.

REASONS FOR GRANTING THE WRIT

The question whether the last-minute intervention of the United States in federal district court actions brought by Indian Tribes against a State eliminates the State's Eleventh Amendment immunity with respect to the Tribes when the United States asserts the same claims or issues originally asserted by the Tribes is an important question of federal law that has not been, but should be, settled by this Court. *See* Rule 10(c), Rules of the Supreme Court of the United States. This Court's recent Eleventh Amendment decisions strongly suggest that the Eleventh Amendment exception allowing federal suits against a State by the United States -- at the instance and under the control of responsible federal officers -- must be narrowly limited to the United States alone and that each claim and party in a federal court action against a State must stand on its own for purposes of the Eleventh Amendment. *See* Rule 10(c), Rules of the Supreme Court of the United States, *supra* (review by this Court is indicated where a Court of Appeals has decided an

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[2] In so holding, the Second Circuit agreed with the Eighth Circuit, the only other Court of Appeals to have considered the issue. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 912-13 (8th Cir. 1997), *aff'd. on other grounds*, ___U.S.___, 119 S. Ct. 1187 (1999).

important question of federal law in a way that conflicts with relevant decisions of this Court).

In these cases, the eleventh-hour intervention of the United States did not alter the fact that the Seneca Nation and the Tonawanda Band had been in control of the litigation from the beginning. This case is thus distinguishable from *Arizona v. California*, 460 U.S. 605, 613-14 (1983), an original proceeding, where this Court permitted five affected Indian Tribes to intervene in water rights litigation in which the United States had intervened on their behalf approximately 25 years earlier. Moreover, this Court has never expanded *Arizona* beyond the narrow confines of this Court's original jurisdiction. This Court has certainly never given *Arizona* the expansive interpretation espoused by the courts below. The Court should grant certiorari in these cases to clarify the limits of the States' consent to suit by the United States where private parties seek to ride the United States' coat-tails into federal court.

ARGUMENT

WHETHER THE LAST-MINUTE INTERVENTION OF THE UNITED STATES IN FEDERAL DISTRICT COURT ACTIONS BROUGHT BY INDIAN TRIBES AGAINST NEW YORK ELIMINATES THE STATE'S ELEVENTH AMENDMENT IMMUNITY REGARDING THE TRIBES WHEN THE UNITED STATES ASSERTS THE SAME CLAIMS OR ISSUES ORIGINALLY ASSERTED BY THE TRIBES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

I. THE DECISION BELOW IS IN TENSION WITH THIS COURT'S ELEVENTH AMENDMENT DECISIONS SINCE *ARIZONA v. CALIFORNIA*.

The decision of the Court of Appeals, holding that the State of New York may be haled into federal court and forced to stand trial not merely at the instance of the United States, but also at the instance of private parties with respect to whom it has never waived its immunity from suit, violates core principles of State sovereignty at the heart of the Eleventh Amendment. Since deciding *Arizona v. California*, 460 U.S. 605 (1983), this Court has emphasized that the Eleventh Amendment does not exist solely to prevent federal court judgments that a State must pay. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). Rather, the very object and purpose of the Eleventh Amendment are to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Eleventh Amendment is rooted in the recognition that the States retained their sovereign immunity upon the formation of the Union, and the Amendment thus

accords the States the respect owed them as sovereign members of the federation. *Puerto Rico Aqueduct*, 506 U.S. at 146; *see also Alden v. Maine*, ___U.S.___, 119 S.Ct. 2240, 2268 (1999) (Congress must accord States "the esteem due to them as joint participants in a federal system").

This Court's decisions subsequent to *Arizona* belie the expansive interpretation of that case adopted by the courts below. In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), this Court held that state sovereign immunity under the Eleventh Amendment bars suit in federal court by an Indian Tribe against a State. This Court stated that:

> [S]ince *Hans v. Louisiana*, 134 US 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty (citations omitted); and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention." (Citations omitted.)

501 U.S. at 779. *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, ___U.S.___, 119 S.Ct. 2199, 2204 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, ___U.S.___, 119 S.Ct. 2219, 2223 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997). In *Blatchford*, this Court concluded that the States had not surrendered their immunity to suit from Indian Tribes in the plan of the convention and that Congress had not abrogated such immunity.

Although this Court acknowledged that the States' sovereign immunity did not bar suit by the United States in federal court on behalf of Indian Tribes as guardians of the Tribes' rights, this Court concluded that the United States could not delegate to the Tribes its exemption from state sovereign immunity, stating:

> The consent, "inherent in the convention," to suit by the United States -- at the instance and under the control of responsible federal officers -- is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

501 U.S. at 785; *see also Alden*, 119 S.Ct. at 2269 (States have not consented to suits by employees under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, although they have consented to suits by the United States on the employees' behalf).

In *Coeur d'Alene*, 521 U.S. at 281-82 (1997), this Court reiterated that the Eleventh Amendment precluded a State's being haled before a federal court at the instance of an Indian Tribe, stating that the Eleventh Amendment would bar a quiet title suit brought by an Indian Tribe against a State in federal court, absent the State's consent. *See also* 521 U.S. at 289 (O'Connor, J, concurring in part and concurring in the judgment) (a federal court cannot summon a State before it in a private action seeking to divest the State of a property interest).

The fact that the United States has intervened in these actions does not mean that the State has lost its Eleventh Amendment immunity with respect to other parties, even those raising the same claims as the United States. Since *Arizona*, this Court has clarified that each claim in a federal court action must stand on its own for purposes of the Eleventh Amendment. In *County of Oneida, New York v. Oneida Indian Nation of New York State*,

470 U.S. 226, 250-53 (1985), this Court held that the defendant counties' cross-claim against New York for indemnification, which was ancillary to the Tribe's land claim against the counties, was barred by the Eleventh Amendment. This Court stated, "The Eleventh Amendment forecloses, however, the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." 470 U.S. at 251.

The Court in *Oneida* relied upon its decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), where it held that a federal court suit against State officials based on State law violated the Eleventh Amendment where the relief sought and ordered had a direct impact on the State itself, even though the claim was pendent. In *Pennhurst*, this Court stated, "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." 465 U.S. at 121 (footnote omitted). This Court further noted there that the presence of the United States as a plaintiff with respect to claims based on federal law did not remove the Eleventh Amendment from consideration:

> Although the Eleventh Amendment does not bar the United States from suing a State in federal court, see, *e.g.*, *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934), the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third-parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case.

465 U.S. at 103, n. 12. *See also United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 885 (D.C. Cir. 1999), *supplemental opinion*, 173 F.3d 890 (D.C. Cir. 1999) (noting in an action under the False Claims Act that the presence of the United States as a co-plaintiff ordinarily does not remove the Eleventh Amendment bar for claims by other plaintiffs), *petition for certiorari filed*, ___U.S.___, No. 99-213 (August 2, 1999). This Court's decisions in *Oneida* and *Pennhurst*, decided after *Arizona*, establish that each claim in a federal action against a State must independently satisfy the Eleventh Amendment and cannot ride the jurisdictional coat-tails of the United States or anyone else.

Such a conclusion accords with New York's limited surrender of sovereign immunity upon its ratification of the Constitution. New York's consent to suit by the United States was not consent to suit by anyone else. *Alden*, 119 S.Ct. at 2269. Suits by the United States against a State "do not denigrate the dignity and respect owed the states in the way that suits by individuals do." *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 213 (2d Cir. 1998)(Weinstein, J., dissenting), *cert. granted*, 67 U.S.L.W. 3784 (U.S. June 24, 1999) (No. 98-1828); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (such suits do "no violence to the inherent nature of sovereignty"). This is in part because federal officials are answerable to the political process in which the States are also participants in a way that private parties are not. *Alden*, 119 S.Ct. at 2267 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."). Thus, the exception to the Eleventh Amendment permitting federal suits against a State by the United States should be narrowly interpreted because the necessary State consent to such suits inherent in the constitutional plan is limited to actions brought by the United States alone.

New York has never consented to federal suits by private parties, including Indian Tribes, even those asserting claims identical to those brought on their behalf by the United States. The argument that New York's Eleventh Amendment has been "breached" by the United States, thus allowing the intervention of any private parties asserting identical claims, ignores the fact that such actions are no longer solely, or even primarily, at the instance and under the control of responsible, and politically responsive, federal officers. The United States initially refused to bring an action against New York raising the Seneca Nation's Cuba Lake claims and did not intervene in either action until years after they were commenced. In such circumstances, when the United States finally intervened at the eleventh hour, it could hardly be said to be controlling the litigation.

Allowing the Tribes to remain in or intervene in these actions is in no way essential to the permanence of the Union nor is New York's consent to such intervention otherwise inherent in the plan of the convention. *See, e.g., United States ex rel. Long v. SCS Business Technical Institute, Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999), *supplemental opinion*, 173 F.3d 890 (D.C. Cir. 1999) (it is "quite a stretch" to claim that the ability of the United States to delegate its exemption from the Eleventh Amendment to a private qui tam relator under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, was part of the inherent constitutional design or is essential to the permanence of the Union), *petition for certiorari filed*, ___U.S.___, No. 99-213 (August 2, 1999). Additionally, the continuation or intervention of the Tribes in these actions denigrates the dignity and respect owed New York as a sovereign member of the federal system by subjecting the State to the coercive process of the federal court at the instance of private parties.

II. *ARIZONA v. CALIFORNIA* IS NOT DISPOSITIVE.

The courts below rejected New York's Eleventh Amendment claim in the mistaken view that the defense was precluded by *Arizona*. That case, where the United States intervened almost at the very beginning of the litigation, is distinguishable from the present cases. Moreover, *Arizona* was an original jurisdiction case which this Court has never applied to federal court jurisdiction generally.

In *Arizona*, 460 U.S. at 613-14, this Court held that the Eleventh Amendment did not bar the intervention of five Indian Tribes in an original proceeding commenced in this Court by Arizona against California regarding water rights to the Colorado River system, because the United States had, approximately 25 years earlier, intervened in the proceeding on behalf of the reservations of the five Tribes. This Court stated:

> Assuming, *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe, *United States v. Minnesota*, 270 U.S. 181, 193-195 (1926), the States involved no longer may assert that immunity with respect to the subject matter of this action. Water right claims for the Tribes were brought by the United States. Nothing in the Eleventh Amendment "has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965). See, *e.g.*, *United States v. Texas*, 143 U.S. 621, 646 (1892); *United States v. California*, 297 U.S. 175 (1936); *United States v. California*, 332 U.S. 19, 26-28 (1947). The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to

> intervene, and the State's sovereign immunity protected by the Eleventh Amendment is not compromised. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21 (1981).

460 U.S. at 614.

Arizona is distinguishable from the present cases. There, the United States intervened at the beginning of the action and had already litigated the rights of the five Tribes to a decree in 1964. Thus, the contours of the litigation upon the intervention of the Tribes had already been established by the earlier proceedings controlled by the United States. Accordingly, the litigation subsequent to the tribal intervention was still primarily at the instance and under the control of responsible federal officers. The same cannot be said of the present actions, in which the United States initially refused to bring one action and then declined to intervene in both until years after the tribal plaintiffs commenced these actions and only after the State defendants sought dismissal on Eleventh Amendment grounds. Here, the litigation remains at the instance and under the control of the tribal plaintiffs who commenced it, and such critical fact is not affected by the eleventh-hour "me too" intervention of the United States. Contrary to the conclusion of the Court of Appeals, *Arizona* does not authorize the continued participation or intervention of the tribal plaintiffs against New York.

Moreover, this Court's reasoning in *Arizona* was explicitly based on footnote 21 of its decision in *Maryland v. Louisiana*, 451 U.S. 725, 745-46, n. 21 (1981), another original proceeding. In *Maryland*, this Court accepted the special master's recommendation that private pipeline companies be allowed to intervene as plaintiffs, "noting that it is not unusual to permit intervention of private parties *in original actions*." *Id.* (Emphasis added.) In support of this proposition, this Court cited two decisions containing no Eleventh Amendment analysis of the intervention issue at all, *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922), and

Trbovich v. United Mine Workers of America, 404 U.S. 528, 536-37 (1972). Earlier in footnote 21, the Court rejected Louisiana's Eleventh Amendment challenge, observing that its original jurisdiction:

> is not affected by the provisions of the Eleventh Amendment which only withholds federal judicial power in suits against a State "by Citizens of another State, or by Citizens or Subjects of any Foreign State." Thus, an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals.

451 U.S. at 745, n. 21 (citation omitted).

This Court's decision in *Arizona* was thus premised on its longstanding practice, apparently undertaken without analysis of the Eleventh Amendment immunity issues involved, of allowing private parties to intervene in original proceedings before the Court that were otherwise initially within this Court's original jurisdiction and not initially precluded by the Eleventh Amendment. As the Special Master recognized in *Arizona*, the Supreme Court's 1964 decree controlled the distribution of the water at issue there, and thus, the *Arizona* litigation was the only forum in which the Tribes could participate in the adjudication of their claims. *Arizona v. California*, No. 8, Original, Elbert P. Tuttle, Special Master, Memorandum and Report on Preliminary Issues, August 28, 1979, p 20. Although endorsed in *Arizona*, also an original proceeding, the practice referred to in *Maryland v. Louisiana* has never been interpreted by this Court to give Indian Tribes carte blanche to sue the States in district courts whenever they are able to persuade the United States to intervene on their behalf before the case goes to final judgment and then "constructively intervene" in their own actions.

Moreover, any reading of *Arizona* that would have allowed such a practice has been repudiated in this Court's post-*Arizona* Eleventh Amendment decisions, *supra*, which limit ancillary and pendent jurisdiction in this context. The decisions of the courts below permitting the Nation and the Band to continue in these actions against New York represent an unwarranted expansion of this Court's holding in *Arizona*, which should be limited to the narrow context of Supreme Court original proceedings.

III. THE QUESTION PRESENTED BY THIS PETITION IS IMPORTANT TO NEW YORK AND OTHER STATES.

The Seneca Nation and the Tonawanda Band have controlled these actions from their inception, and continue to direct the litigation despite the belated intervention of the United States. Consequently, in these actions, unlike actions solely at the instance and under the control of responsible federal officers, the State is denied effective recourse to the political process which affords States some measure of protection when they are sued by the United States alone. Here, the private parties, if they are allowed to continue as parties, will have a substantial and likely dispositive say in the conduct of the litigation against New York, in contravention of New York's sovereign immunity under the Eleventh Amendment.

Absent reversal by this Court, each of the tribal plaintiffs will be entitled to conduct its own discovery, depose witnesses of its choosing, present its own witnesses at trial, including its own experts, and cross-examine the State's witnesses.[3] Thus, New York will be unduly burdened by litigation, and its dignitary

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[3] Although the merits of the Cuba Lake claim have been resolved against the State, the district court order contemplates further proceedings regarding remedies and the exact scope of the land involved (44a). The district court has not yet ruled on the merits of the Niagara islands claim.

interests disparaged, if it is forced to defend these claims against three separate party plaintiffs rather than against only the United States. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This is precisely what the Eleventh Amendment is designed to protect the States from.

Whether New York State must be forced to remain a defendant with respect to tribal claims where the United States subsequently intervenes in the action is a question of federal constitutional law the importance of which extends well beyond these two cases. New York, its Governor, or its agencies, are defendants (or proposed defendants) in four pending Indian land claim actions involving more than 300,000 acres of land in six upstate New York counties, in addition to the two actions at issue here. *See Cayuga Indian Nation of New York v. Pataki*, 80-CV-930, 80-CV-960 (N.D.N.Y.) (United States a plaintiff, 64,000 acres in Seneca and Cayuga Counties); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (United States a plaintiff, 250,000 acres in Madison and Oneida Counties, motion to add State as a defendant pending); *St. Regis Mohawk Tribe v. State of New York*, 82-CV-783, 82-CV-1114, 89-CV-829 (N.D.N.Y.) (United States a plaintiff, 15,000 acres in Franklin and St. Lawrence Counties); *Stockbridge-Munsee Community v. State of New York*, 86-CV-1140 (N.D.N.Y.) (six-mile square tract in Oneida and Madison Counties). In three of the actions involving nearly all the disputed acreage, the United States is a plaintiff.

Moreover, the United States has not limited its practice of intervening to resuscitate Indian actions against States to either land claims or cases involving New York. In *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 912-13 (8th Cir. 1997), *aff'd. on other grounds*, ___U.S.___, 119 S. Ct. 1187 (1999), the United States employed the same tactic to frustrate Minnesota's Eleventh Amendment defense against the

Mille Lacs Band in a dispute over treaty rights. If allowed to continue unchecked, such practice would severely curtail the States' Eleventh Amendment immunity, recognized by this Court in *Blatchford*, to suits by Indian tribes.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: Albany, New York
August 13, 1999

Respectfully submitted,

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May 17, 1999 Opinion of the Court of Appeals for the Second Circuit and Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1998

(Argued: April 26, 1999 Decided: May 17, 1999)

Docket Nos. 99-6003, 99-6005

SENECA NATION OF INDIANS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

—v.—

STATE OF NEW YORK; GEORGE E. PATAKI, as Governor; JOSEPH SEYMOUR, as Commissioner of the Office of General Services; and BERNADETTE CASTRO, as Commissioner of Parks, Recreation and Historic Preservation,

Defendants-Appellants,

FREDERICK W. TAPP, JANE E. SCHUCK, KENT SANDFORD, RICHARD J. MCCUTCHEON, BEVERLY A. MCCUTCHEON, ALBERT A. HOFFMAN, LUCY HOFFMAN, MYLES BARRACLOUGH, SANDRA BARRACLOUGH, DUANE G. GLOVER, PAUL H. GEER, VIRGINIA M. GEER, SCOTT E. FISHER, ROSEMARY N. FISHER, WILLIAM E. CAMPBELL, DAVID J. GIBSON, CLARENCE J. COFFMAN, JR., C.

JAMES COFFMAN, SR., JEAN COFFMAN, EILEEN W. GARLING, ROBERT F. VAN DER HORST, SUSAN F. VAN DER HORST, JOSEPH CHIAPUSO, SUSAN CHIAPUSO, HOWARD B. WHITNEY ESTATE, DEBORAH BALDWIN, ROBERT L. JONES, EUGENIA JONES, STEPHEN M. KANE, CLARENCE J. COFFMAN, SR., HOWARD L. LUZIER, FLORENCE LUZIER, WALTER L. WHITNEY, Executor, LOUISE HICKEY, PHILLIP CONFER, SHIRLEY CONFER, DAVID C. WILLIAMS, and FRANCES E. WILLIAMS,

Defendants.

SENECA NATION OF INDIANS,

Plaintiff-Appellee,

TONAWANDA BAND OF SENECA INDIANS,

Plaintiff-Intervenor-Appellee,

UNITED STATES OF AMERICA, on its own behalf, and for the benefit of the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians,

Plaintiff-Intervenor-Appellee,

—v.—

STATE OF NEW YORK, Individually and as a representative class of landowners similarly situated,

Defendant-Appellant,

THE NEW YORK STATE THRUWAY AUTHORITY; ERIE COUNTY; MOORE BUSINESS FORMS, INC., Individually and as a representative of a class of landowners similarly situated; INDUCOM, INC., Individually and as a repre-

sentative class of landowners similarly situated; RADO-O-MART, INC., Individually and as a representative class of landowners similarly situated; ILONA H. LANG, Individually and as a representative class of landowners similarly situated; ROBERT W. WEAVER; Individually and as a representative class of landowners similarly situated; FRANCIS B. PRITCHARD,

Defendants,

GEORGE E. PATAKI, BERNADETTE CASTRO, RONALD W. COAN, JOHN CAHILL, JOSEPH BOARDMAN, JOHN R. PLATT,

Intervenors-Defendants.

B e f o r e :

WINTER, *Chief Judge*,
MINER, and POOLER, *Circuit Judges*.

Appeal from an order denying defendants-appellants' motion for summary judgment (John T. Curtin, *Judge*) and from an order denying their motion to dismiss (Richard J. Arcara, *Judge*) on the ground that the claims of the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians are not barred by the Eleventh Amendment. Because the United States has been granted permission to intervene and the tribes' complaints seek the same relief as the United States's complaint, the Eleventh Amendment does not bar the tribes' claims. We therefore affirm.

ANDREW D. BING, Assistant Attorney General (Eliot Spitzer, Attorney General of the State of New York; Peter H. Schiff, Acting Solicitor General; Nancy A. Spiegel, Assistant Attorney General, of counsel), Albany, New York, *for Defendants-Appellants.*

JEANNE S. WHITEING, Whiteing & Smith (Robert P. Isaac, Jr., Deputy Attorney General, Seneca Nation Department of Justice, Salamanca, New York; Arlinda F. Locklear, Jefferson, Maryland, of counsel), Boulder, Colorado, *for Plaintiff-Appellee.*

SAMUEL C. ALEXANDER, Attorney, Environment & Natural Resources Division, U.S. Department of Justice (Lois J. Schiffer, Assistant Attorney General, Environment & Natural Resources Division, United States Department of Justice; David C. Shilton, Attorney, of counsel), Washington, D.C., *for Plaintiff-Intervenor-Appellee* United States of America.

Steven M. Tullberg, Indian Law Resource Center (June L. Lorenzo and Alexandra Page, of counsel), Washington, D.C., *for Plaintiff-Intervenor-Appellee* Tonawanda Band of Seneca Indians.

PER CURIAM:

We affirm the orders of the district court denying the State of New York's Eleventh Amendment defenses for substan-

tially the reasons stated by Judge Curtin in the decision below. *See Seneca Nation of Indians v. State of New York*, 26 F. Supp.2d 555, 563-65 (W.D.N.Y. 1998). In doing so, we note that the State of New York retains its Eleventh Amendment immunity to the extent that the Seneca Nation of Indians or the Tonawanda Band of Seneca Indians raise claims or issues that are not identical to those made by the United States. *See Arizona v. California*, 460 U.S. 605, 614 (1983) (holding that granting tribes leave to intervene in suit commenced by United States against states does not violate Eleventh Amendment because "[t]he Tribes do not seek to bring new claims or issues against the states").

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 17th day of May, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Ralph K. Winter
Chief Judge
Hon. Roger J. Miner
Hon. Rosemary S. Pooler
Circuit Judges

Docket Nos. 99-6003, 99-6005

SENECA NATION OF INDIANS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

-v-

STATE OF NEW YORK; GEORGE E. PATAKI, as Governor, JOSEPH SEYMOUR, as Commissioner of the Office of General Services; and BERNADETTE CASTRO, as Commissioner of Parks, Recreation and Historic Preservation,

Defendants-Appellants,

FREDERICK W. TAPP, ET AL.,

Defendants.

SENECA NATION OF INDIANS,

Plaintiff-Appellee,

TONAWANDA BAND OF SENECA INDIANS,

Plaintiff-Intervenor-Appellee,

UNITED STATES OF AMERICA, on its own behalf,
and for the benefit of the Seneca Nation of Indians and
the Tonawanda Band of Seneca Indians,

Plaintiff-Intervenor-Appellee,

-v-

STATE OF NEW YORK, Individually and as a representative
class of landowners similarly situated,

Defendant-Appellant,

THE NEW YORK STATE THRUWAY AUTHORITY, ET AL.,

Defendants,

GEORGE E. PATAKI, ET AL.,

Intervenors-Defendants.

Appeals from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the orders of said district court be and they hereby are affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:

S/ Beth J. Meador
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FILED MAY 17, 1999
CAROLYN CLARK CAMPBELL, CLERK
SECOND CIRCUIT
ISSUED AS MANDATE: July 12, 1999
A TRUE COPY
Karen Greve Milton
ACTING CLERK

October 31, 1998 Decision and Order of the District Court (Curtin, D.J.) (Cuba Lake)

SENECA NATION OF INDIANS

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-v-

STATE OF NEW YORK, GEORGE PATAKI, AS GOVERNOR; JOSEPH SEYMOUR, AS COMMISSIONER OF GENERAL SERVICES; BERNADETTE CASTRO, AS COMMISSIONER OF PARKS, RECREATION AND HISTORIC PRESERVATION; JOSEPH AND SUSAN CHIAPUSO; HOWARD B. WHITNEY ESTATE; WALTER L. WHITNEY; JANE E. SCHUCK; KENT SANDFORD; RICHARD J. AND BEVERLY A. MCCUTCHEON; ALBERT A. AND LUCY HOFFMAN; MYLES AND SANDRA BARRACLOUGH; DUANE G. GLOVER; PAUL H. AND VIRGINIA M. GEER; DEBORAH H. BALDWIN; ROBERT L. AND EUGENIA JONES; STEPHEN M. KANE; SCOTT E. AND ROSEMARY N. FISHER; WILLIAM A. CAMPBELL; DAVID J. GIBSON; CLARENCE J. COFFMAN, SR.; CLARENCE J. COFFMAN, JR.; C. JAMES COFFMAN, SR., AND JEAN COFFMAN; EILEEN W. GARLING; ROBERT F. AND SUSAN F. VAN DER HORST; HOWARD AND FLORENCE LUZIER; EUGENE AND LOUSIE HICKEY; PHILLIP AND SHIRLEY CONFER; DAVID C. AND FRANCES E. WILLIAMS; KENNETH CAMPBELL; FREDERICK TAPP; SUSAN BUNKER,

Defendants.

No. 85-CV-411C.

United States District Court,
W.D. New York

Oct. 31, 1998.

Jeanne Whiteing, Boulder, Colorado, Arlinda F. Locklear, Jefferson, Maryland, for plaintiff.

United States Department of Justice, Environment & Natural Resources Division, Indian Resources Section (Ann C. Juliano, of counsel), Washington, D.C., for plaintiff-intervenor United States.

Dennis C. Vacco, Attorney General of the State of New York (David B. Roberts, Assistant Attorney General, of counsel), Albany, New York, for defendants.

DECISION and ORDER

CURTIN, District Judge.

President Washington ... met with Cornplanter, Chief of the Seneca Nation, shortly after the enactment of the 1790 [Indian Nonintercourse] Act.[1] They discussed the Senecas' complaints, about land transactions, and Washington assured them that the new statute would protect their interests. Washington told Cornplanter:

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[1] The Indian Nonintercourse Act was enacted by the first Congress in 1790 and has been reenacted in substance by subsequent Congresses to the present date. It is also referred to as the "Trade and Intercourse Act." This court, like the Supreme Court, will refer to it as the "Nonintercourse Act."

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States....

* * * * * *

"If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons."[2]

BACKGROUND

The Seneca Nation of Indians ("Senecas") bring the present action seeking a declaration that certain lands on the Senecas' Oil Spring Reservation were illegally appropriated by the State of New York ("State") in violation of the Senecas' treaty rights and in violation of the Indian Nonintercourse Act, 25 U.S.C.§ 177,[3] and that the transactions involving these lands are therefore void. In addition to declaratory relief quieting title in the various parcels described in its Second Amended Complaint (Item 58), the Senecas seek injunctive relief to prevent the State and any of the named defendants from selling the parcels at issue, damages

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[2] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237-38 n. 8 (1985) ("*Oneida II*") (quoting 4 American State Papers, Indian Affairs, Vol. 1, at 142 (1832)).

[3] 25 U.S.C. § 177 states in relevant part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution ... under the authority of the United States.

for the State's alleged trespass to the land, and the ejectment of the individual defendants currently residing on the disputed land (Item 58).

The defendants include the State, the Governor, several State Executive Department officers, and numerous private parties leasing cottage lots on the disputed land from the State. The individual defendants are represented by the State Attorney General's Office; consequently, in this order when the court refers to the State's arguments, the individual defendants are included.

After the suit was filed, extensive settlement negotiations followed without success. Finally, on August 26, 1994, both the Senecas and the defendants filed cross-motions for summary judgment (Items 68 and 69). The parties thoroughly briefed their arguments and submitted affidavits with extensive exhibits. The court did not proceed to decision and issued a stay on August 13, 1996 (Item 102), because the Supreme Court granted *certiorari* in a case raising similar issues, *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th. Cir.1994), *cert. granted*, 517 U.S. 1132 (1996). After the Supreme Court decided *Idaho v. Coeur dAlene*, 521 U.S. 261 (1997), on July 10, 1997, the court set a new briefing schedule.

On August 20, 1997, the United States filed a motion to intervene (Item 105), which the court granted on January 29, 1998 (Item 120). The United States' complaint in intervention (Item 125) seeks to enforce the provisions of the Nonintercourse Act for the benefit of the Senecas and seeks the identical relief as the Senecas' Second Amended Complaint. The United States submitted a motion for summary judgment on August 26, 1997 (Item 109), before the court permitted the government to intervene, in order to comply with the established briefing schedule.

On July 17, 1998, the court heard oral argument on the cross-motions for summary judgment.

FACTS

The Seneca Nation is a federally recognized tribe that owns the Oil Spring Reservation located in Cattaraugus and Allegany Counties, New York. The Senecas reserved the one-mile square reservation to themselves under the Treaty of November 11, 1794, 7 Stat. 44, between the United States and the Six Nations, of which the Senecas were a member. These lands were reconfirmed to the Senecas under the Treaty of September 15, 1797, 7 Stat. 60, between Robert Morris and the Senecas, a treaty approved by the United States. Under the 1797 Treaty, the Oil Spring Reservation consisted of 640 acres.

In 1858 and the years that followed, the State took possession of the land at issue in this litigation, together with adjacent lands owned by non-Indians through its power of eminent domain as part of a project to construct a dam which would provide water for the Genesee and Erie Canals. The Senecas contend that the State took approximately 47.25 acres belonging to them for this project (Item 71, ¶ 8). Of the 47.25 acres, the State took 13.19 acres for the Oil Creek Reservoir, today known as Cuba Lake, and 2.2 acres for construction of a new road along the reservoir. These parcels form the basis for Count I of both the Senecas' Second Amended Complaint and the United States' Complaint in intervention.

The Senecas allege that the rest of the 47.25 acres were taken by the State as follows: (1) 2.36 acres for the excavation of an outlet from the reservoir; (2) 26.96 acres that the State anticipated would be damaged and flooded by the construction of the reservoir; and (3) 2.53 acres for the deposit of soil from the construction (Item 58, ¶ 37; Item 71, ¶ 9). These parcels form the basis for Count II of both the Senecas' and the United

States' complaints. With respect to the 26.96 acres, the State submits that it never took possession of the 26.96 acres; but rather, it had an easement allowing it to flood those acres (Item 86, ¶ 8).

In the years that followed the initial construction of the reservoir, the State passed Chapter 342 of the Laws of 1863, authorizing additional appropriations to raise the water level of the reservoir an additional three feet (Item 69, ¶ 10; Item 86, ¶¶ 9, 11, 14). According to the State, when the water level was raised in accordance with this authority, additional acreage within the reservation was taken (Item 59, ¶ 11). The State asserts that the precise acreage and location of lands flooded when the reservoir level was raised are difficult to ascertain; however, it notes that the Indian Claims Commission ("ICC") found that the appropriation was 3.7 acres (Id, ¶¶ 12-13). The State has identified part of the land it believes was appropriated pursuant to Chapter 342 of, the Laws of 1863 (Item 73, Exh. 11, Attachment 1).

The Senecas dispute the State's contentions about this second appropriation (Item 84, ¶¶ 2, 7-8), contending that while the reservoir was raised three feet in about 1864 pursuant to Chapter 342, it was raised an additional six feet in 1869 and an additional two feet in 1872 pursuant to other authorities *(Id., ¶ 7)*. The Senecas assert that there is no evidence that the possession of additional reservation lands was the result of the raising of the reservoir in 1863 pursuant to Chapter 342, and the logical inference to be drawn from these facts is that the additional taking was the result of the last raising of the reservoir in 1872 (*Id.*). The Senecas insist that neither the ICC nor the Court of Claims made binding findings of a later appropriation of 3.7 acres (*Id., ¶ 9*).

The Senecas contend that the State took additional lands within the reservation after 1858. In particular, they assert that

the State took possession of approximately one acre of land for the purpose of constructing a new road along the reservoir. This parcel forms part of the basis for Count III in both the Senecas' and United States' complaints.

The State Canal Commissioners appropriated the land by a process known as inverse condemnation, by which they entered upon the land and took it without first instituting a condemnation proceeding. Under such a process, the landowner whose land was appropriated could petition court-appointed land appraisers for compensation. NY Rev. Stat., Tit. IX, Arts. 2 & 3 (Weed, Parsons & Co., 2d ed., 1869) (Item 73, Exh. 23). The Senecas brought such a petition, and in a decision dated June 23, 1865, the canal appraisers awarded it $1,319.89 in damages and six years' interest for lands previously appropriated (Item 73, Exh. 11, Attachment 9). The parties disagree as to whether this award was solely compensation for the 47.25 acres appropriated in 1858, or whether the award also encompassed the disputed subsequent appropriations described above. The Senecas contend that there were never any judicial or administrative condemnation proceedings for any of the alleged takings after 1858 (Item 71, ¶ 14; Item 72, at 23-25; Item 84,¶ 2).

In about 1878, the State abandoned the Genesee Valley Canal but continued to use the reservoir as part of the Erie Canal system until about 1892 when it also abandoned that use (Item 69, ¶ 16). According to the Senecas, by the early 1900's squatters had begun to erect cottages along the shores of Cuba Lake, and approximately 150 cottages had been erected by 1913 (Item 58, ¶ 47). In 1913 and 1914, the State divided the lakefront property into numbered lots and leased the lots. The Senecas allege that some of the lots lie entirely within the original boundaries of the Oil Springs Reservation which the State did not purport to appropriate in 1858, and portions of other lots lie within the reservation (Item 69, ¶¶ 48-49; Item 71, ¶ 2). According to the Senecas, the State appropriated approximately 2.5

acres of reservation land in this manner and leased it to private individuals. The State contends that with the exception of a small acreage lying outside the claim area, these lots are located entirely within the 47.25 acres acquired by the State in 1858. These parcels form part of the basis for Count III of the Senecas' and the United States' complaints.

In January 1924, the Senecas submitted a formal petition to the Commissioners of the New York Land Board seeking a determination of its rights to the Oil Spring property (Item 83, Exh. 31). It contends that its petition sought the return only of the lands appropriated by the State in 1858, for which an award was made in 1865 (Item 84, ¶ 11). In their petition, the Senecas claimed that the lands reverted to them when the use for which the lands had been taken was abandoned. They also claimed that they were entitled to the rents realized by the State from cottage lots rentals on the subject property (Item 83, Exh. 31).

The New York State Attorney General advised the Commission that the appropriation of the lands was valid because: (1) under the laws of New York, land taken for public use did not revert to the former owner upon abandonment of that use; (2) the statute of limitations was a bar to the claim in the same manner as in the case of a citizen; and (3) the Senecas, having been compensated, had no moral right to the title nor to the monies collected from the rents. The Commissioner followed the recommendation of the Attorney General and denied the petition (Item 69, Exh. B, ¶¶ 24-25) (citing *Seneca Nation of Indians v. United States*, 12 Ind.Cl.Comm. 552, 559-60 (1963)).

On January 5, 1927, Congress enacted a statute that granted the State jurisdiction over fishing and hunting on certain Seneca lands. The 1927 Act states in relevant part:

> [T]he laws of the State of New York (including laws hereafter enacted) relating to the taking of game and

> fish shall be applicable to the taking of game and fish within the Allegany, Cattaraugus, and Oil Spring Indian Reservations in the State of New York; except that—...
>
> (3) ...this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings.

Act of Jan. 5, 1927, Ch. 22, 44 Stat. 932 (Item 73, Exh. 15).

On September 14, 1960, the Senecas filed a Second Amended Petition before the ICC, in which it claimed that the United States had failed and neglected to aid and assist the Senecas in recovering the land that is the subject of the present action (Item 69, Exh. A). The Senecas sought money damages due to the United States' failure in its treaty obligations and duties as guardian to protect the petitioner in its rightful possession and use of its lands and to preserve and maintain the Senecas' title. The ICC found as a matter of fact that the State appropriated 47.25 acres in 1858 or 1859 and 3.7 acres sometime between 1863 and 1872 without any grant of authority, consent, or approval of Congress or any officer or agency of the federal government. *Seneca Nation I*, 12 Ind.Cl.Comm. at 558 (Item 69, Exh. B). The ICC also found that the lots that the State had rented after 1913, with the exception of a small acreage, were located entirely within the 47.25 acres acquired by the State in 1858. *Id.*at 560.[4] The ICC found that the United States was under no fiduciary duty or obligation to protect the Senecas' interest in the subject lands because the Nonintercourse

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[4] The Senecas assert that because the issue of whether the lands were actually appropriated was not actually litigated before the ICC or the Court of Claims, any findings of fact on that issue are merely dicta (Item 84, ¶ 9).

Act did not apply to transfers of Indian lands to the State of New York. *Id.* at 563-569.[5]

The Senecas appealed the ICC's decision to the United States Court of Claims. The Court of Claims affirmed the ICC's decision on two separate grounds: (1) the appropriation did not violate the Nonintercourse Act because Congress had ratified the taking in the 1927 Act; and (2) the Indian Claims Commission Act does not subject the United States to liability for failing to take steps to recover the land since the Senecas never attacked the compensation paid by New York and never sought to have the United States recapture the tracts or their value for the Senecas. *Seneca Nation of Indians v. United States*, 173 Ct.Cl. 912 (1965) (Item 69, Exh. C).

The Senecas point out that the United States did not plead the defense of ratification, even though it was an affirmative defense which the ICC rules required to be pled in the government's answer (Item 82, at 17). The Senecas submit that the United States' failure to plead ratification as an affirmative defense constitutes a waiver of that defense. As a result, it argues that it did not brief the ratification defense in its brief to the ICC. In its decision, the ICC did not reach or even address the issue of ratification. Since the ICC had ruled against the Senecas on different grounds and the United States had not originally pled the defense, the Senecas assert that they did not brief the ratification issue in their brief to the Court of Claims (*Id.* at 18). A review of the briefs to the Court of Claims reveals that the United States raised the issue in its brief to the Court of Claims; however, the Senecas did not submit a reply brief arguing that because the briefing before the Court of Claims on this issue was

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[5] At that time, some courts had held that because New York State existed before there ever was a federal government, the Nonintercourse Act did not apply to the State. Today, there is no dispute that the Nonintercourse Act does apply to the State.

'one-sided, the issue was not "actually litigated" before the Court of Claims (*Id.*).

The State responds, saying that the Senecas were represented by counsel, and they were afforded a full opportunity to pursue discovery, present evidence, and engage in comprehensive briefing both before the ICC and the Court of Claims (Item 88, at 5). The State suggests that the Senecas' attorneys made the tactical decision not to present evidence and arguments on the ratification issue, and the Senecas should not now be able to avoid preclusive doctrines because of these poor tactical choices. Further, the State contends that the Senecas' argument that ratification was an affirmative defense which the United States waived lacks merit (*Id.* at 7).

In the early 1980s, the New York State legislature passed laws authorizing conveyance of the disputed land. Chapter 263 of the New York State Laws of 1981, as amended by Chapter 644 of the Laws of 1983 and Chapter 596 of the Laws of 1987 (Item 71, ¶ 17; Item 112, ¶ 5). The Senecas assert that the State intends to sell and convey or lease the subject lands, which will in turn transfer title to the individual defendants (Item 71, ¶ 18; Item 112, ¶ 5). The Senecas contend that the sale or lease of these lands will cause irreparable injury and will leave them without any adequate remedy at law. As such, it seeks a permanent injunction preventing the defendants from selling, leasing, or otherwise conveying the subject lands. This claim forms the basis for Count IV in both the Senecas' and the United States' complaints.

In Count V of both the Senecas' and the United States' complaints, the parties allege that the acts of the individual defendants in taking possession of the Cuba Lake lots, that the Senecas claim lie all or in part on reservation land not appropriated by the State in 1858, constitute a trespass upon the Senecas' land. They seek damages for trespass and for profits the State

made in leasing of the lots at issue. Finally, as to all Counts, the Senecas, joined in part by the United States, seek a declaration that the leases between the State and individual defendants to specified Cuba Lake lots are void, and an order ejecting all defendants from the disputed land (Item 58, at 17).

The State has asserted nine affirmative defenses to the Senecas' Second Amended Complaint (Item 51). The most significant of these defenses include: (1) the court lacks jurisdiction to adjudicate the claims because the Eleventh Amendment grants the State absolute immunity from such claims (Third Defense); (2) the present complaint should be dismissed under either the doctrine of res judicata or the doctrine of collateral estoppel (Fourth and Fifth Defenses); and (3) the United States consented to and ratified the State's "purchase" of the land (Sixth and Seventh Defenses). As for the remaining defenses, the Senecas and the United States have briefly responded to most of them; however, the State has not discussed them in its briefs.

The United States' complaint in intervention was just filed on July 13, 1998 (Item 125). The State has not yet filed an answer to it.

DISCUSSION

I. The State's Eleventh Amendment Immunity

Both the Senecas and the State devoted substantial portions of their initial briefs to the question of whether the Eleventh Amendment barred the Senecas' claims against the State. Since that time, the United States has intervened. The parties do not dispute that the entire Eleventh Amendment debate is academic as applied to the United States. The Eleventh Amendment, by its very terms, concerns only citizens of states and citizens of foreign states-not the United States. The Supreme Court in its

most recent cases involving suits brought by Indian tribes against States in federal court have recognized that the United States is not barred by the Eleventh Amendment from bringing such a suit. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 2033 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n. 14 (1996); *see also Arizona v. California*, 460 U.S. 605, 614 (1983) (quoting *United States v. Mississippi*, 380 U.S. 128, 140 (1965)) ("[N]othing in the [Eleventh Amendment] has ever been seriously supposed to prevent a State's being sued by the United States.").

The State contends that the United States intervened only after the Supreme Court's decisions in *Seminole Tribe* and *Coeur d'Alene* as a last-ditch attempt to defeat the State's sovereign immunity (Item 122). The State notes that the United States refused to bring an action against the State raising the Senecas' claims and that it declined to intervene when this suit had been filed by the Senecas. At oral argument, the United States explained that it had participated in settlement negotiations between the State and the Senecas in the hope that they could broker a settlement without intervening in the litigation. The United States joined the action once it became apparent that its direct participation would be necessary. Accordingly, the court does not have to reach the many issues raised by the parties now that the United States has intervened.

If the court were to find that the Senecas' claims are barred by the State's Eleventh Amendment immunity, it would still be entitled to intervene in the United States' case. As the Senecas correctly point out, courts have regularly permitted Indian tribes to join or to intervene in cases brought by the United States against states, either as a matter of right under Fed.R.Civ-P. 24(a) or permissibly under Rule 24(b). *See, e.g., Nevada v. United States*, 463 U.S. 110 (1983); *Arizona*, 460 U.S. at 614-15. In *Arizona*, the Supreme Court granted a motion to intervene made by several Indian tribes in an action over rights

to the waters of the Colorado River brought by the United States. *Arizona*, 460 U.S. at 613. The Court held that because the tribes did not seek to bring new claims or issues against the states, the federal courts' "judicial power over the controversy [wa]s not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment [wa]s not compromised." *Id.* at 614.

The State does not challenge that the Senecas could intervene in the United States' claims if the court were to find that the Senecas' complaint itself was barred by the Eleventh Amendment, nor does it argue that the Senecas lack a sufficient interest to enable them to intervene in the United States' claims. Instead, the State reiterates that the Supreme Court's recent decisions make it clear that this court lacks jurisdiction to entertain the Senecas' claims, and the State contends that the United States' intervention does not alter this result (Item 122, at 5). The State notes that in an unpublished oral decision, United States District Judge Neal P. McCurn in the Northern District of New York dismissed an Indian tribe's claims against the State even after the United States had intervened (*Id.*, at 5 and Attachment B (*Cayuga Indian Nation of New York v. Pataki*)). However, this court does not find the *Cayuga Nation* decision helpful because Judge McCurn did not discuss the ability of the tribe to intervene, and he only briefly mentioned the Eleventh Amendment issues. Furthermore, the tribe in *Cayuga Nation* did not raise the possibility of intervention or cite to *Arizona*. Instead, the tribe was content to allow the United States to represent it in the litigation. Here, as opposed to *Cayuga Nation*, the Senecas are not content to allow the United States alone to represent their interests in this litigation.

In *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *cert. granted*, —U.S.—, 118

S.Ct. 2295 (June 8, 1998),[6] the United States intervened in a lawsuit commenced by bands of Indians. The Eighth Circuit affirmed the District Court's holding that because the United States and the Indian bands are seeking the same relief, and because the United States, as an intervenor, has the right to continue the suit even without the presence of the bands, the State's sovereign immunity is not compromised and the Eleventh Amendment does not bar the claims.

This court finds that this case strongly supports the Senecas' contention that they should be allowed to proceed in the present case. Even though the United States has only recently joined the present action, its participation is not new. The Eleventh Amendment protects a State from being hailed into federal court. Now that the United States is a plaintiff in the instant case, the State is properly before a federal court. The Senecas' and the United States' claims are virtually identical. Allowing the Senecas' claims to proceed does not further compromise the State's sovereign immunity. The interest of judicial economy is best served by allowing the Senecas' claims to continue.

II. *Judicial Estoppel*

The State contends that the United States' claim founders on the doctrine of judicial estoppel (Item 122, at 6-9). As the Second Circuit explained in *Bates v. Long Island Railroad Co.*, 997 F.2d 1028, 1037 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993) (internal citation omitted) (emphasis added):

> The doctrine of judicial estoppel prevents a party from asserting *a factual position* in a legal proceeding that is contrary to a position previously taken by him in a

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[6] The Supreme Court granted *certiorari* on an issue other than the question of a state's Eleventh Amendment immunity.

> prior legal proceeding. The doctrine has not been uniformly adopted by federal courts...
>
> Unlike equitable estoppel, which is designed to ensure fairness in the relationship between parties, judicial estoppel protects the sanctity of the oath and the integrity of the judicial process.

In *Bates*, the Second Circuit defined the elements of judicial estoppel to include: (1) the party against whom judicial estoppel is asserted must have argued an inconsistent position in a prior proceeding, and (2) the prior inconsistent position must have been adopted by the court in some manner. *Id.* at 1038.

The State argues that both elements are satisfied in this case. In the ICC/Court of Claims action (hereinafter referred to as *"Seneca I"*), the United States argued that the 1927 Act constituted a congressional ratification of the acquisitions challenged in the instant litigation, and the court adopted this argument in its holding. The State contends that *Seneca I* was a final judgment from which no appeal was taken (Item 122, at 6). The State asks the court to broaden the doctrine of judicial estoppel to include inconsistent legal positions asserted by a party in successive actions.

The United States asserts that it is not taking an inconsistent position in the present action in light of the change in the legal standard for ratification announced by the Supreme Court in *County of Oneida v. Oneida Indian Nation* 470 U.S. 226, 247-48 (1985) (*"Oneida II"*). In *Oneida II*, the Supreme Court held that only "plain and unambiguous" ratification will extinguish Indian title. *Id.* The United States argues that given this change in the law, its present position that Congress did not provide plain, unambiguous, and explicit ratification is not inconsistent with its previous argument in *Seneca I*. In *Seneca I*, the United States asserted that the 1927 Act demonstrated Congress' acquiescence in New York's acquisition of the land

and that the Act was an implied ratification of that acquisition (Item 111, at 11-12 and Attachment A, at 49). The United States did not assert that the 1927 Act demonstrated plain, unambiguous, and explicit ratification of the State's acquisition. The United States relied upon case authority that held that implicit approval was sufficient for congressional ratification.

The State contends that the United States' bottom-line position in the 1965 litigation was that congressional ratification in fact was evidenced in the 1927 Act, and this ultimate legal and factual conclusion cannot be reconciled with the position that the United States urges in the present case (Item 122, at 6-7). The court does not agree with this conclusion. Judicial estoppel bars changes in factual positions. *Bates*, 997 F.2d at 1037. The United States' allegedly inconsistent statement was not so much a statement of fact, but rather a legal position. In *Seneca I*, the United States argued that under specified legal precedent the 1927 Act implicitly ratified the State's 1858 taking. In the current action, the United States argues that based on the same underlying facts, under *Oneida II*, the 1927 Act did not plainly or unambiguously ratify the taking. The court declines to extend the doctrine of judicial estoppel to include seemingly inconsistent legal positions. There is no legal authority for such a broadening of the doctrine. The State must rely on other preclusion doctrines to challenge a legal position.[7]

Even if the doctrine of judicial estoppel applied to inconsistent legal positions, the Second Circuit has made it clear that "there must be a true inconsistency between the statements in the two proceedings. If the statements can be reconciled, there is no

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[7] The State cannot circumvent the federal government's exemption from non-mutual collateral estoppel by trying to use the doctrine of judicial estoppel to challenge the United States' legal position regarding the appropriate legal standard for ratification and the application of the same facts to a revised legal standard.

occasion to apply an estoppel." *Simon v. Safelite Glass Corp.*, 128 F3d 68, 72-73 (2d Cir. 1997). The change in the legal standard for congressional ratification enunciated in *Oneida II* and *United States v. Clarke*, 445 U.S. 253 (1980), reconciles the change in the United States' legal position from almost twenty years earlier in *Seneca I*.

Furthermore, the United States correctly notes that the Second Circuit requires some evidence of misconduct by a party against whom judicial estoppel has been invoked. In *Young v. United States Department of Justice*, 882 F2d 633, 639-40 (2d Cir.1989), *cert. denied*, 493 U.S. 1072 (1990), the Second Circuit intimated that there must be some evidence of an intent to mislead or to deceive the court before a court applies judicial estoppel to preclude a party's new claim. Here, the State does not argue that the United States has ever sought to mislead or to deceive the courts in either this litigation or in *Seneca I*, and the record does not reveal any such intent.

Based on the foregoing, the court finds that the doctrine of judicial estoppel does not bar the United States' complaint.

III. *Res Judicata and Collateral Estoppel*

The State contends that the Senecas' claims are barred under the doctrines of res judicata and collateral estoppel since these very claims and the legal issues involved therein were already litigated in *Seneca I*.

A. Res Judicata

Under the doctrine of res judicata, also known as claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). "Res judicata prevents the subsequent

litigation of any defense or ground for recovery that was available to the parties in the original action, whether or not it was actually litigated or determined." *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir.1981). Res judicata is not concerned with whether a prior judgment was right or wrong or whether subsequent changes in the law or considerations of fairness should merit a different result in the subsequent litigation. *Nemaizer v. Baker*, 793 F.2d 58, 64-66 (2d. Cir.1986). The doctrine is concerned with bringing an end to litigation after the parties have had a fair opportunity to litigate their claims.

In *Cayuga Indian Nation of New York v. Cuomo*, 667 F.Supp. 938, 947 (N.D.N.Y.1987) *(Cayuga II)*, the court held that because the ICC was created to resolve claims against the United States, the plaintiffs in that case could not have proceeded against non-federal defendants, at least those who did not derive title directly from the United States, in that forum. Therefore, the court held, res judicata did not bar the plaintiffs from bringing an action against non-federal defendants pursuant to 25 U.S.C. § 177 where the plaintiffs had brought a prior action against a federal defendant before the ICC. *Id.*

The State seeks to distinguish the *Cayuga II* holding from the present case, arguing that in *Cayuga II* the issue of federal government ratification was not raised before the ICC, it was not litigated, and it was not essential to the ICC's decision (Item 70, at 11). The State also argues that in *Cayuga II* the plaintiff received a favorable ruling from the ICC, and the defendants in that case argued that this precluded the subsequent Nonintercourse Act action for additional relief against defendants who were not parties to the ICC proceeding. In the present case, the decisions of the ICC and the Court of Claims were adverse to plaintiff. The State argues that the Senecas should not be allowed to relitigate the very issue decided against them (*Id.* at 12).

Neither argument satisfactorily distinguishes *Cayuga II* from the present case. First, the *Cayuga II* court's discussion of ratification was in the context of its consideration of collateral estoppel and involved a different, and narrower, question than the one at issue here. *Cayuga II*, 667 F.Supp. at 948 ("The issue of federal government ratification was not before the ICC.... Thus, collateral estoppel does not bar this court's determination of the issue of federal government ratification of the conveyances."). Second, the disposition of a claim in favor of a particular party is not relevant to the preclusive effect of the claim in a subsequent suit.

The State also argues that although neither it nor its lessees were parties in *Seneca I*, they must be deemed as having been in privity with the federal government for res judicata purposes. The State argues that it had complete unity of interest with the United States which "strenuously advocated" that the 1927 Act constituted a ratification of the State's condemnation of the property at issue (Item 70, at 9-10). After responding to the Senecas' briefs, the State refined its position, arguing that the United States' litigation position in defense in *Seneca I* was a legal theory that inherently closely aligns the United States with the State for res judicata purposes (Item 88, at 4-5).

The Senecas correctly point out that although the definition of privity has been broadened to include relationships that may not have been previously contemplated,[8] even under its broadened scope, the State cannot be considered to have been in privity with the United States in *Seneca I*. Chapter 4 of the Restatement (Second) of Judgments, which is cited by the

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[8] In *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996), the Supreme Court stated that "although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of the term."

Supreme Court in *Richards v. Jefferson County*, 517 U.S. 793, 798-99 (1996), sets out the circumstances in which non-parties may be in privity with parties to an action. These circumstances include: (1) persons who control the litigation (§ 39); (2) persons agreeing to be bound by the adjudication between others (§ 40); and (3) persons represented by a party (§ 41). Section 41 further sets out those circumstances in which a person who is not a party to an action is considered to be represented by a party and therefore entitled to the benefits of the judgment.[9] None of these circumstances existed between the State and the United States in *Seneca I* . Therefore, there is no basis on which the State can claim to be in privity with the United States in order to claim res judicata benefits from the 1965 Court of Claims decision.

There is no legal authority for the proposition that a similar or even identical litigation position is sufficient to align a new party with a party in an earlier litigation. The cases which the State has cited for the proposition that privity is a flexible concept do not support a finding of privity in this case (*See* Item 70, at 10-11). Most significantly, although the court in *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 640

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[9] Section 41(1) provides, in relevant part:

A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with the authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2d Cir.), *cert. denied*, 484 U.S. 992 (1987), did consider whether the interests of the non-party were adequately represented in the initial action, the court clearly stated that such interests had to be represented "by another vested with the authority of representation" (citation omitted.) In *Seneca I*, the United States was never vested with the authority of representing the State.

The State relies on *Nevada*, 463 U.S. at 110 and *Mashpee Tribe v. Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983), in which prior actions to adjudicate title to property were held to bar subsequent property actions by the same defendants and new, similarly situated defendants. *Seneca I* was an action for money damages for the alleged breach of the United States' fiduciary duty. It was not an action to quiet title, nor could it have been since the ICC and the Court of Claims lack jurisdiction over such an action. Thus, although some similar issues were brought up in *Seneca I*, that action was not "a comprehensive adjudication" of the true ownership of the land in question. Therefore, *Nevada and Mashpee* cannot be authority in the instant dispute because of the obvious lack of privity between the United States and the State discussed above.

Furthermore, two cases cited by the State at oral argument, *United States v. Pend Oreille Public Utility Dist. No. 1.*, 926 F.2d 1502 (9th Cir.), *cert. denied*, 502 U.S. 956 (1991) and *Western Shoshone Nat. Council v. Molini* 951 F.2d 200, 202 (9th Cir.1991), *cert. denied*, 506 U.S. 822 (1992), are distinguishable from the case at bar and inapplicable. Both are cases in which the tribes first brought claims before the ICC for compensation for the taking of tribal lands and where the tribes challenged takings by the federal government or entities under their control (not by states). In order to determine whether the tribes were entitled to compensation, the ICC had to squarely address the question of whether Indian title had been extinguished. Therefore, because the history and the legal bases for

Pend Oreille and *Western Shoshone* are different from the circumstances of the case at bar, the court finds that neither case is applicable.

B. Collateral Estoppel

Collateral estoppel, or issue preclusion, bars a party from litigating an issue that was "actually litigated and necessary to the outcome" of a prior adjudication. *Parklane Hosiery*, 439 U.S. at 326 n. 5. The State argues that the Senecas should be estopped from asserting a claim that they have previously litigated and lost against another defendant, thereby invoking the defensive use of collateral estoppel. (Item 70, at 15, quoting *Parklane Hosiery*, 439 U.S. at 329). For collateral estoppel to apply:

> (1) The issues in both proceedings must be identical; (2) the issue in the prior proceeding must have been actually litigated and actually decided; (3) there must have been a full and fair opportunity for litigation in the prior proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.

Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir.1986), *cert. denied* 480 U.S. 948 (1987); *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997).

The State argues that in *Seneca I* the Senecas were represented by counsel and were afforded a full opportunity to pursue discovery, present evidence, and engage in comprehensive briefing, both before the ICC and the Court of Claims (Item 88, at 5). The State notes that the United States expressly raised the argument that the 1927 Act constituted congressional ratification of the State's condemnation of the subject lands at oral argument before the ICC (*Id.*, Item 89, Exh. 4, at 18). The State contends that the tactical decision of the Senecas' attorneys

not to respond to this argument cannot now be used to support its contention that it did not have a full and fair opportunity to litigate the issue in the first proceeding (Item 88, at 5-7).

In *Conte v. Justice*, 996 F.2d 1398, 1401 (2d Cir.1993), the Second Circuit explained that "[u]nder New York law, an inquiry into whether a party had a full and fair opportunity to litigate a prior determination must concentrate on the various elements which make up the realities of litigation." (citations omitted). The court further stated that:

> [f]actors listed by the New York Court of Appeals to assist in this inquiry include the forum for the prior litigation, the competence and experience of counsel, the foreseeability of future litigation, and the context and circumstances surrounding the prior litigation that may have deterred the party from fully litigating the matter.

Id.

Applying these factors to the instant case, the court agrees that the Senecas had a full and fair opportunity to litigate the ratification issue in *Seneca I*. The record shows that the United States did argue the ratification issue prior to the ICC's determination and again before the Court of Claims. No matter how the Senecas characterize it, their attorneys made the choice not to respond to these arguments or raise its waiver argument before the ICC or the Court of Claims. If there were defects in the United States' pleadings in the prior action, the proper forum for such an argument was the ICC or the Court of Claims, not this court approximately thirty years later. The Senecas cannot blame their silence on other parties. Both the ICC and the Court of Claims provided the Senecas with ample opportunity to present their arguments in both written and oral forms.

However, even though the court finds that the ratification issue was actually litigated and necessary to the Court of Claims' decision, the Senecas are correct in their contention that the circumstances of this case fit within one of the recognized exceptions to collateral estoppel. Because the court finds that two exceptions to collateral estoppel apply to the circumstances of this action, the Senecas' claims are not barred by collateral estoppel.

First, the Senecas correctly point out that collateral estoppel is less favored when the issue to be precluded is a legal one, and least favored when it is one of statutory construction (Item 72, at 33). *United States ex. rel Stinson, Lyons, Gerlin and Bustamante, P.A. v. Blue Cross and Blue Shield of Georgia*, 755 F.Supp. 1040, 1046 (S.D.Ga. 1990). As the Second Circuit has noted:

> Especially, where pure questions of law are presented, courts and commentators both have recognized that the interests of finality and judicial economy may be outweighed by other substantive policies, for in this circumstance "[t]he interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis."

Haitian Centers Council Inc. v. McNary, 969 F.2d 1350, 1356 (2d Cir.1992), (quoting 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4425, at 244 (1981)), *rev'd on other grounds*, 509 U.S. 155 (1993). Further, the Supreme Court has long recognized that "'[w]here . . . a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise.'" *Montana v. United States*, 440 U.S. 147, 162 (1979) (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)).

The State contends that this "unmixed questions of law" exception has been called into question by subsequent rulings, citing *United States v. Stauffer Chemical Company*, 464 U.S. 165, 171 (1984) and *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 775 F.2d 366, 375 (D.C.Cir.1985) *judgment vacated by*, 787 F.2d 674 (D.C. Cir. 1986). Both *Stauffer* and *Clark-Cowlitz*, however, involved subsequent actions involving the same parties. Thus, the courts found that in cases where the same parties had already litigated the same purely legal questions, the unmixed questions of law exception to collateral estoppel should not apply. In the present case, we have a different defendant and a different legal demand. The claims at issue in this case, to quite title and for ejectment, were not and could not have been asserted before the ICC or Court of Claims. The present defendants have not argued this issue before and won a favorable ruling; therefore, it is not unfair to force them to litigate this issue here.

Second, the United States cannot be barred from litigating the ratification issue in the instant litigation. In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court held that nonmutual collateral estoppel (where the parties in the first action are not the same as the parties in the second action, and the party who seeks to preclude a party from relitigating an issue was not a party in the first action) could not be applied against the United States government. The Court explained that "[a] rule allowing nonmutual collateral estoppel against the Government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160. The Court emphasized the importance of enabling the government to change its policies, stating that "the panoply of important public issues raised in government litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue." *Id.* at 161. The Supreme Court recently reaffirmed its holding that

nonmutual collateral estoppel does not apply where the United States is the party sought to be precluded from relitigating an issue. *United States v. Alaska*, 521 U.S. 1, 117 S.Ct. 1888, 1896 (1997). Since the defendants in the instant action were not parties to *Seneca I* they cannot assert collateral estoppel against the United States in the present action.

When the State and the Senecas first briefed this exception to collateral estoppel, the United States had not yet intervened in this action. The Senecas sought an extension of this exception to include those situations where the United States could, yet had not, brought a suit on behalf of a private party. In effect, the Senecas wished to step in the shoes of the United States for purposes of this exception to collateral estoppel simply because the United States could have brought this suit on the Senecas' behalf. Because the United States has since intervened, the court does not have to rule on the Senecas' request for an extension of the exception. The United States' complaint in intervention is virtually identical to the Senecas' Second Amended Complaint, making the same claims and seeking the same relief. As a practical matter, because the United States is not barred from relitigating the ratification issue and because the United States can litigate the issue on the Senecas' behalf, it makes no difference whether the Senecas are barred from relitigating the issue. The United States has adopted most of the Senecas' arguments regarding the ratification issue; therefore, the Senecas' arguments will be considered in the very least indirectly.

IV. *The Seneca Nation's and the United States' Nonintercourse Act Claims*

Both the Senecas and the United States contend that they are entitled to judgment as a matter of law on their Nonintercourse Act claims. Under 25 U.S.C. § 177, any conveyance by an Indian

tribe not made pursuant to a treaty or convention under the federal constitution is "void *ab initio*." *Oneida II*, 470 U.S. at 245.

To establish a violation of the Nonintercourse Act, a plaintiff must show that:

(1) it is or represents an Indian "tribe" within the meaning of the Act; and

(2) the parcels of land at issue herein are covered by the Act as tribal land; and

(3) the United States has never consented to the alienation of the tribal land; and

(4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

Oneida Indian Nation of New York v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd part, rev'd in part*, 470 U.S. 226 (1985). The only element that the State challenges is whether the United States consented to the disputed land acquisition. This is the very issue that the Senecas and the United States litigated in *Seneca I* which the court has found is not barred by collateral estoppel.

The State contends that the 1927 Act ratified the conveyance because if referred to lands "heretofore acquired by the State of New York by condemnation proceedings" (Item 85, at 3-5). The United States has adopted the evidence and arguments of the Senecas, and it asserts that it did not give its consent or approval to the conveyance by treaty (Item 111, at 5 and n. 3). There is no question that the United States did not consent to the appropriation by treaty or convention, as required by the Nonintercourse

Act. The State admits that the 1858 appropriation and subsequent possessions were not consented to contemporaneously by the United States (Item 73, Exh. 12, ¶ 11). Thus, the consent element of the Senecas' claim has been met.

However, the State has raised the affirmative defense of ratification. The Senecas and the United States contend that under the standards established in *Oneida II*, the 1927 Act does not constitute congressional ratification of the disputed acquisitions. In *Oneida II*, the Supreme Court held that only "'plain and unambiguous'" ratification will extinguish Indian title. *Oneida II*, 470 U.S. at 248 (quoting *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 346). In *Oneida II*, two federal treaties described lands to be ceded by the Oneidas and, in doing so, referred to a prior conveyance by the Oneidas to the State of New York. Petitioners in *Oneida II* claimed that the language "all the lands . . . from the northeastern corner of lot No. 54 in the last purchase from them . . ." and ". . . to their lands heretofore ceded by the said Oneida nation of Indians to the People of the State of New York" demonstrated ratification by the United States of the prior sales to New York. *Oneida II*, 470 U.S. at 247-48. The Supreme Court rejected this argument outright and stated: "The language cited by petitioners, a reference in the 1798 treaty to 'the last purchase' and one in the 1802 treaty to 'land heretofore ceded,' far from demonstrates a plain and unambiguous intent to extinguish Indian title." *Id.* at 248.

In addition, after *Oneida II*, courts in this circuit have rejected the argument that implicit congressional ratification will satisfy the requirements of the Nonintercourse Act. *See Cayuga II*, 667 F.Supp. at 945 (held that ratification "must be plain and unambiguous, as well as explicit").

Once again, the 1927 Act states in relevant part:

> [T]he laws of the State of New York (including laws hereafter enacted) relating to the taking of game and fish shall be applicable to the taking of game and fish within the Allegany, Cattaraugus, and Oil Spring Indian Reservations in the State of New York; except that—. . .
>
> > (3) . . . this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings.

Act of Jan. 5, 1927, Ch. 22, 44 Stat. 932 (Item 73, Exh. 15). The Senecas and the United States argue that the reference to Oil Spring Reservation land in subsection (3) of the 1927 Act was merely meant to identify and except the particular parcel of land from a broad-sweeping hunting and fishing rights provision, thereby serving as a savings clause preserving the status quo. They argue that this exception to a hunting and fishing law cannot amount to a ratification of the State's prior appropriations of land in the Oil Spring Reservation (Item 72, at 17; Item 111, at 8).

The Senecas and the United States further argue that the legislative history of the 1927 Act shows that there was no intent to ratify the acquisitions. Most significant is a statement made by Congressman Reed of New York, the bill's sponsor, in which he explained that:

> [The House and Senate bills] are identical with the exception that there is an amendment in the Senate bill that excepts certain property which was condemned by the State of New York. That is all.
>
> * * *
>
> The Senate bill is identical with the exception that there is an amendment in the Senate bill . . . [T]he only difference is that

> some years ago the State of New York condemned certain lands for canal purposes, and the amendment in the Senate bill is simply to except those lands from this measure. That is all.

(Item 73, Exh. 18). "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

The Senecas contend that this statement shows that Congress did not intend to ratify the prior taking through the 1927 Act. The purpose of the subsection (3) was "simply to except those lands from this measure." (Item 72, at 19). The United States adds that the Department of the Interior addressed this very issue in a letter to Congressman Reed in June 1926 when it wrote: "It is not the intention of this Office to recognize title to the land as being in the state or in the Indians by reason of this proposed amendment." (Item 111, at 10 n. 5).

The Senecas and the United States also point out that the same session of Congress that passed the 1927 Act passed another statute which expressly ratified a transfer of a different tract of land within the Oil Spring Reservation to the State. That Act provided, in pertinent part:

> That a certain instrument of conveyance dated December 30, 1927, from the Seneca Nation of Indians to Seneca Oil Spring Association (Incorporated), granting by quitclaim title a tract of land having a radius of seventy-five feet from the center of the oil spring located on the Oil Spring Reservation, New York, and a right of way . . . is hereby confirmed and the approval of the Assistant Secretary of the Interior Department of February 28, 1928, thereof is hereby validated.

Act of May 22, 1928, Ch. 691, 45 Stat. 1857 (described in Item 72, at 19-20). The Senecas and the United States contend that

this legislation shows that Congress knew how to expressly ratify a transfer of Oil Spring lands, and it is entitled to "great weight" in interpreting the 1927 Act.

The 1927 Act cannot be viewed as a plain, unambiguous, and explicit ratification of the State's acquisition of Oil Spring land. The language of the statute itself is ambiguous on its face. Although the statute clearly refers to land on the Oil Spring Reservation that was condemned by the State, the reference does not suggest that Congress was making any finding as to who currently held title to that land. Further, the legislative history reveals that Congress merely intended to except the described lands from the hunting and fishing measure announced by the Act. In addition, the letter from the Department of the Interior to Congressman Reed shows that the United States government understood that any reference to the land might raise the question of congressional ratification of the State's acquisition and that the Department of the Interior did not intend for the Act to make any judgment on the question of title. Finally, the 1928 Act ratifying the transfer of a different parcel of land in the Oil Spring Reservation to the State demonstrates that Congress understood its power to ratify transfers of Indian land and that when it intended to ratify a transfer, it did so explicitly. The 1927 Act did not state that it "ratified", "confirmed", or "approved" the acquisition, words that Congress used in other legislation that actually ratified land transfers.

Accordingly, because the 1927 Act did not ratify the State's acquisitions of the disputed lands, the court finds that these acquisitions violated the Nonintercourse Act as a matter of law.

V. *The State's Other Affirmative Defenses*

The State asserted several additional affirmative defenses in its answer to the Senecas' Second Amended Complaint (Item 59). The parties did not thoroughly brief these remaining defenses,

nor did they present arguments during oral argument. The court finds that each of the defenses is insufficient as a matter of law and therefore can be dismissed at this time.[10]

A. Laches

In its answer, the State asserts that the Senecas' claims are barred by the federal common law defense of laches (Item 59, ¶ 18). However, in *Oneida II*, the Supreme Court indicated that the application of laches to an Indian land claim would be novel and contrary to earlier decisions of the Court. *Oneida II*, 470 U.S. at 244 n. 16. Further, in *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1084 (2d. Cir.1982) ("*Oneida Nation*"),[11] the Second Circuit rejected all "delay-based defense[s] founded on federal law." The court held that "at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States," and that since the action in question in that case would not have been barred by the applicable statute of limitations, it should not be barred by laches. *Id.*

This suit is brought to quiet title in land, for ejectment, and for trespass. Title 28 U.S.C. § 2415(c) provides that there is no limitations period for suits for possession or title brought by the United States. Title 28 U.S.C. § 2415(b) provides that Indian claims that are on a list published by the Secretary of the Interior pursuant to section 4(c) of the Indian Claims Limitations Act of 1982 are not barred until (1) one year after the Secretary publishes, in the Federal Register, a rejection of the claim, or

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[10] In addition to the following three defenses, the State asserted that the Senecas have not stated a claim upon which relief can be granted (Item 59). This defense is clearly inappropriate under *Oneida II*, 470 U.S. at 233, and the foregoing discussion.

[11] This case is not directly related to the *Oneida II* line of cases.

(2) three years after the Secretary submits legislation to Congress to revoke the claim. The present claim was listed by the Secretary in the Federal Register on March 31, 1983 (Item 73, Exh. 20), but it has never been rejected, nor has the Secretary submitted legislation to revoke the claim. Thus, the claim was timely when the United States recently intervened.

B. Political Question Doctrine

In *Oneida II*, the Supreme Court rejected the political question defense to Nonintercourse Act claims. *Oneida II*, 470 U.S. at 249. The Court found no "unusual need for unquestioning adherence to a political decision already made," and consequently found the claim justiciable. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). The basis for the defendants' claim in *Oneida II* was the fact that the Commissioner of Indian Affairs had declined to bring an action on behalf of the Indian tribe with respect to the claims being litigated in *Oneida II*.

In *Oneida Nation*, the Second Circuit stated that "adjudication of Indian land claims such as the instant action is wholly consistent with the prevailing conceptions of the relationship among the three branches of government concerning the appropriate means to redress the historical wrongs committed against the Native American." *Oneida Nation*, 691 F.2d at 1081. The court further observed that "to [their] knowledge no Indian land claim has ever been dismissed on nonjusticiability grounds." *Id.*

Based on the foregoing, the court rejects the State's political question defense.

C. Election of Remedies Doctrine

In *Cayuga II*, the Northern District of New York rejected the election of remedies defense on a prior Indian Claims Commission action. *Cayuga II*, 667 F.Supp. at 946. The court explained

that the doctrine is given little, if any, validity in federal practice, and that it is a harsh doctrine that is not favored. *Id.* In order for the doctrine to apply, there must be: (1) the existence of two or more remedies; (2) the inconsistency of such remedies; and (3) a choice of one of them. *Id.* (citing *Davis v. Rockwell International Corp.*, 596 F.Supp. 780, 787 (N.D.Oh. 1984)).

The *Cayuga II* court held that:

> [A]ny conveyance of land in contravention of the dictates of the Nonintercourse Act is invalid, as if it did not occur at all . . .
>
> Therefore, even if the doctrine of election of remedies were generally accepted in federal practice, which it is not, the court concludes that it is inapplicable here. Neither plaintiff was afforded a true choice of remedies as the receipt of additional consideration is no remedy at all for an invalid conveyance of land. The court thus finds no merit to the defendants' argument based on the doctrine of election of remedies.

Cayuga II, 667 F.Supp. at 946.

There is no dispute that the Senecas could not seek the equitable remedies that they seek in the present action. They could only seek money damages and thus were not given a true choice of remedies. Although *Cayuga II* is not binding authority, this court finds the reasoning to be persuasive and rejects the State's election of remedies defense.

CONCLUSION

For the foregoing reasons, the court grants the Seneca Nation's and the United States' motion for summary judgment

(Items 67, 68, and 110) and denies the State's motion for summary judgment (Item 69).

Having found as a matter of law that the State violated the Nonintercourse Act when it acquired the disputed Oil Spring lands, the court has determined the general question of liability. Nevertheless, there still remain questions of the precise land at issue and the appropriate remedies. Accordingly, a telephone conference is scheduled for November 17, 1998, at 3:30 p.m. when the court will discuss with the parties how to proceed.

So ordered.

August 12, 1998 Report and Recommendation of Magistrate Judge Heckman (Grand Island)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE SENECA NATION OF INDIANS,

Plaintiff,

and THE TONAWANDA BAND OF SENECA INDIANS, and THE UNITED STATES OF AMERICA,

Plaintiff-Intervenors,

v.

93-CV-688A(H)
REPORT AND RECOMMENDATION

STATE OF NEW YORK, GEORGE E. PATAKI, BERNADETTE CASTRO, DR. RONALD W. COAN, JOHN CAHILL, JOSEPH BOARDMAN, JOHN R. PLATT, THE NEW YORK STATE THRUWAY AUTHORITY, ERIE COUNTY, MOORE BUSINESS FORMS CORP., INDUCOM, INC., RAD-O-MAT HOLDINGS U.S., INC., ILONA H. LANG, ROBERT W. WEAVER, and FRANCIS B. PRITCHARD,

Defendants.

Pending before the court are defendants' motions to dismiss the United States' complaint in intervention on the ground that the complaint is barred by the applicable statute of limitations. Defendants also move to dismiss the complaint of the Seneca Nation and the Tonawanda Band based on Eleventh Amendment immunity. For the reasons set forth below, I find that the United States' complaint in intervention is not barred by the statute of limitations. Furthermore, I find that the United States' presence as a plaintiff in the case precludes dismissal of the tribes' claims based on Eleventh Amendment immunity. Accordingly, defendants' motions to dismiss should be denied. A pretrial conference will be held on Tuesday, October 13, 1998, at 3:00 p.m. to schedule further proceedings in the case.

BACKGROUND

On August 1, 1996, the State of New York moved for dismissal based on sovereign immunity under the Eleventh Amendment (Item 88). The state also moved pursuant to Rule 19 of the Federal Rules of Civil Procedure to dismiss the claims against defendants Inducom, Inc., Rad-O-Mart, Inc., Ilona H. Lang, Robert W. Weaver and Francis B. Pritchard on the ground that complete relief could not be accorded in this action in the state's absence. Defendants Erie County and Moore Business Forms, Inc. also filed motions for dismissal under Rule 19 (Items 91 and 93).

On August 13, 1996, the Seneca Nation and Tonawanda Band sought a stay of proceedings in this case pending the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, ___U.S.___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (June 23, 1997). The *Coeur d'Alene* case involved the issue of whether the Eleventh Amendment prevents an Indian tribe from suing state officials in federal court for adjudication of title and possessory rights to waters and submerged lands held by the state. On

September 23, 1996, this court granted the stay, finding it likely that the decision in the *Coeur d'Alene* case would have some bearing on the issues in this case (Item 98).

On June 23, 1997, the Supreme Court issued its decision in the *Coeur d'Alene* case. This court then allowed the Seneca Nation and the Tonawanda Band to add certain state and county officials as defendants in this case (Item 111). The Seneca Nation and the Tonawanda Band filed their amended complaints, adding the following defendants: George E. Pataki, Governor of New York; Bernadette Castro, New York State Commissioner of Parks; Michael Zagata, New York State Commissioner of Environmental Conservation; John Daly, New York State Commissioner of Transportation; John Platt, Executive Director of the New York State Thruway Authority; and, Ronald Coan, Director of the Erie County Industrial Development Agency. Defendants then refiled their motions to dismiss (Items 114, 116 and 118). Oral argument of the motions was held on February 20, 1998.

Meanwhile, on March 20, 1998, the United States filed its motion to intervene. On April 28, 1998, the court granted the motion. On May 8, 1998, defendants moved to dismiss the United States' complaint in intervention (Item 149). Defendants claim that the complaint in intervention is barred by the applicable statute of limitations. Defendants continue to maintain that the complaints of the Seneca Nation and the Tonawanda Band are barred by the Eleventh Amendment.

DISCUSSION

I. 28 U.S.C. § 2415.

Defendants contend that the claim in intervention is barred by the statute of limitations for commencement of actions by the

United States on behalf of Indian tribes, set forth at 28 U.S.C. § 2415. That statute provides, in pertinent part:

(a) [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States ... which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: ... *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: ... *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim ....

(b) [A]n action to recover damages resulting from a trespass on lands of the United States ... and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues....

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall,

for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

28 U.S.C. § 2415(a), (b), (c), (g).[12]

By its express terms, § 2415(c) renders the limitations periods of § 2415(a) and (b) inapplicable to actions brought by the United States to establish title or possessory rights to real property. *See United States v. Mottaz*, 476 U.S. 834, 848 n. 10 (1986). Defendants argue that the United States' complaint in intervention in this case is not subject to the express exclusion of § 2415(c) because, in its prayer for relief, the complaint seeks only "a judgment awarding damages" (*see* Item 146, "Prayer for Relief"). According to defendants, this brings the United States' claim within the limitations period of § 2415(b) as "an action to recover money damages for trespass on lands ...."

This argument must be rejected. The United States' complaint expressly states that it seeks "a declaration that the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians, pursuant to federal treaties and statutes, hold the right of possession to [the Niagara islands] ... and to recover, for the

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Section 2415 was originally enacted on July 18, 1966. States on behalf of Indians. Claims that accrued before July 18, 1966 were deemed to have accrued on that date. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 242 (1985). In the 1982 amendment, known as the "Indians Claims Limitation Act of 1982." Pub.L. No. 97-394, 96 Stat. 1976, Congress directed the Secretary of the Interior to publish in the Federal Register a list of all Indian claims to which the statute of limitations in § 2415 applied. The Act also directed the Secretary to notify tribes potentially interested in those claims. Tribes then could submit additional claims, which were published on a second list. Actions subject to the statute of limitations in § 2415 that were on neither list were barred unless begun within sixty days of the second list's publication, or by January 7, 1984. *Id.* at 242-43 & n. 15.

benefit of the Seneca Nation and the Tonawanda Band, such relief as may be due to them by reason of defendants' interference with said right of possession" (Complaint in Intervention, Item 146, ¶ 1). Thus, it is clear that the complaint in intervention is an action to establish the title to, or right of possession of, the subject lands. *See County of Oneida v. Oneida Indian Nation, supra*, 470 U.S. at 236-40 (Indian land claims under federal Nonintercourse Act encompass common law claims to enforce tribes' possessory rights); *Westnau Land Corp. v. U.S. Small Business Administration*, 1 F.3d 112, (2d Cir. 1993) (citing "virtually unanimous federal authority" in holding that § 2415(a) did not bar mortgage foreclosure action seeking money damages as alternative relief).

Contrary to the state's argument, under the Federal Rules of Civil Procedure the sufficiency of a pleading is tested by the statement of the claim, not by the relief sought in the demand for judgment. Furthermore, a prevailing party is not limited to the relief demanded. *See Interconex, Inc. v. Federal Maritime Commission*, 572 F.2d 27, 30 n. 4 (2d Cir. 1978) ("[T]he facts and issues alleged in the pleadings and not the form of the prayer for relief determine the relief to be granted."); *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945) ("[P]laintiff is entitled to state his claims in detail if he chooses, and rely upon the court to award him such judgment as his case deserves; and at trial he will not be bound by his prayers."); *see also* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1255, at 367-68.

This general rule of pleading is illustrated in the *Oneida* case, which presented several of the same issues that have been raised in this action. In *Oneida*, the defendants attempted to characterize the tribal land claims as "either the old common law 'action for use and occupancy' or 'an action for wrongful desseisin' or one 'of trespass for mesne profits.'" The defendants sought dismissal of the complaint for failure to allege all of the essential elements

required for any of these actions. The district court ruled as follows:

> There is no need to consider the pleading question posed by this argument. ... Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterized the action, but whether plaintiffs are entitled to relief. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." ... "[It] is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy...."

Oneida Indian Nation of New York State v. Oneida County, 434 F.Supp. 527, 547 (N.D.N.Y. 1977) (quoting Fed.R.Civ.P Rule 54(c), and *Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp.*, 28 F.Supp. 586, 588 (W.D.Pa. 1939); other citations omitted), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in relevant part*, 470 U.S. 226 (1985) ("*Oneida II*").

For these reasons, I find that the claims alleged in the United States' complaint in intervention fall within the exclusionary language of 28 U.S.C. § 2415(c). Accordingly, the United States' complaint in intervention should not be dismissed on statute of limitations grounds.

II. Eleventh Amendment Immunity.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, com-

> menced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. Indian tribes are accorded the same status as foreign sovereigns. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *cert. granted*, ___U.S.___, 118 S.Ct. 2295, 141 L.Ed 2d 156, 66 U.S.L.W. 3777 (June 8, 1998).

The state defendants recognize that the Eleventh Amendment does not apply to the United States' complaint against them. However, they maintain that the tribes' complaints are still barred by the Eleventh Amendment. The tribes respond that this argument is foreclosed by the Supreme Court's holding in *Arizona v. California*, 460 U.S. 605 (1983).

In *Arizona v. California*, the United States sued several states for apportionment of Colorado River water rights on behalf of various federal entities, including five Indian tribes. The tribes were permitted to intervene to challenge the apportionment. The Court stated as follows:

> Nothing in the Eleventh Amendment "has ever been seriously supposed to prevent a state's being sued by the United States." The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Id. at 614 (quoting *United States v. Mississippi*, 380 U.S. 128, 140 (1965); other citations omitted).

Here, the state argues that *Arizona v. California* is inapplicable because in that case the United States and the tribes sought the same relief, whereas in this case the United States seeks only damages. This argument must be rejected. As already discussed, the United States is not limited to the relief set forth in the *ad damnum* clause. Its complaint in intervention requests "such relief as may be due to [the tribes] by reason of defendants' interference with [the tribes'] right of possession" (Item 146, ¶ 1). In their amended complaints, both the Seneca Nation and the Tonawanda Band seek declaratory and injunctive relief (including "ejectment") with respect to their possessory rights, as well as "fair rental value" damages (*see* Item 112, pp. 12-13; Item 113, p. 10-11).

Thus, *Arizona v. California* is controlling, and the defendants' Eleventh Amendment arguments must be rejected. The United States has been granted permission to intervene, which places the United States in the same position as an original plaintiff in the case. No Eleventh Amendment defense can be raised against the United States, and the tribes' complaints seek the same relief as the United States.

This case therefore stands on all fours with *Arizona v. California*. The court's judicial power over the controversy is not enlarged by allowing the tribes' complaints to proceed, and the state's sovereign immunity protected by the Eleventh Amendment is not compromised. *See Arizona v. California, supra*, 460 U.S. at 614; *see also Mille Lacs Band of Chippewa Indians v. State of Minnesota, supra*, 124 F.3d at 913 (since United States, as intervenor on behalf of tribes in suit against state seeking declaration of hunting and fishing rights, "has the right to continue the suit even without the presence of the [tribes],...the State's sovereign immunity is not compromised and the Eleventh Amendment does not bar" the claims against the state and state officials).

Finally, the non-state defendants (Erie County, Moore Business Forms, Inducom, Rad-O-Mart, Ilona H. Lang, Robert W. Weaver and Francis B. Pritchard) concede that should the United States be allowed to proceed in this action as an intervening plaintiff on behalf of the tribes, the non-state defendants' motions to dismiss pursuant to Rule 19 would no longer be viable. Accordingly, since it is recommended herein that the United States be allowed to proceed as plaintiff-intervenor on behalf of the tribes, it is also recommended that the non-state defendants' previously-filed motions to dismiss (Items 91 and 93, refiled as Items 114 and 116) be denied.

CONCLUSION

For the foregoing reasons, it is recommended that defendants' motions to dismiss (Items 88, 91, 93, 114, 116, 118 and 149) be denied. A pretrial conference will be held before the undersigned on Tuesday, October 18, 1998, at 3:00 p.m. to schedule further proceedings in the case.

Respectfully submitted,

S/ Carol E. Heckman
CAROL E. HECKMAN
United States Magistrate Judge

Dated: Buffalo, New York
August 12, 1998

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report and Recommendation in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not presented to the magistrate judge in the first instance. *See, e.g., Patterson-Lietch Co., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wesolek, et al. v. Canadair Ltd., et al.* 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." *Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.*

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

SO ORDERED.

S/Carole E. Heckman
CAROL E. HECKMAN
United States Magistrate Judge

Dated: Buffalo, New York
August 12, 1998

Filed
U.S. DISTRICT COURT
W.D. of N.Y.
AUG 13 1998

November 3, 1998 Order of the District Court (Arcara, D.J.) Adopting Report and Recommendation (Grand Island)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION,

Plaintiff(s),

-v-

1:93-cv-00688

STATE OF NEW YORK,

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 11/3/98, of which the within is a copy, and entered 11/4/98 upon the official docket in this case. (Document No. 171.)

Dated: Buffalo, New York
November 4, 1998

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
304 U.S. Courthouse
68 Court Street
Buffalo, New York 14202

Enclosure
TO:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

TONAWANDA BAND OF SENECA INDIANS,

Plaintiff-Intervenor,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v. ORDER
93-CV-688A

STATE OF NEW YORK, et al.,

Defendants.

This case was referred to Magistrate Judge Carol E. Heckman pursuant to 28 U.S.C. § 636(b)(1), on November 22, 1993. The United States subsequently intervened on behalf of plaintiff Seneca Nation of Indians ("Seneca Nation") and plaintiff-intervenor Tonawanda Band of Seneca Indians ("Tonawanda Band"). Defendants moved to dismiss the United States' complaint-in-intervention on the ground that the complaint is barred by the applicable statute of limitations. Defendants also moved to dismiss the complaint of the Seneca Nation and the Tonawanda Band based on Eleventh Amendment immunity. On August 13, 1998, Magistrate Judge Heckman filed a Report and

Recommendation, recommending that defendants' motions to dismiss be denied.

Defendants filed objections to the Report and Recommendation and the United States, Seneca Nation and Tonawanda Band filed responses to the objections. Oral argument on the objections was held on October 29, 1998.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and Recommendation, and after reviewing the submissions and hearing argument from the parties, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Heckman's Report and Recommendation, defendants' motions to dismiss are denied. The Court shall, however, require the United States to file an amended complaint-in-intervention which clearly states the relief being sought by the United States in this action. The amended complaint-in-intervention shall include, for example, any request for declaratory judgment, injunctive relief, ejectment or money damages. The amended complaint-in-intervention shall be filed by December 18, 1998. No extensions shall be granted.

The Court also refers the following issue to Magistrate Judge Heckman for a Report and Recommendation: Whether the statute of limitations in 28 U.S.C. § 2415(b) bars or limits the recovery of money damages by the United States and/or the Seneca Nation and the Tonawanda Band in this action.

Nothing in this Order shall be interpreted so as to delay discovery or any other proceedings in this case.

The case is referred back to Magistrate Judge Heckman for further proceedings.

IT IS SO ORDERED.

S/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: November 3, 1998

Supreme Court, U.S.
FILED
OCT 14 1999
OFFICE OF THE CLERK

No. 99-269

In The

Supreme Court of the United States

STATE OF NEW YORK, et al.,

Petitioner,

v.

SENECA NATION OF INDIANS, and
UNITED STATES OF AMERICA,

Respondents.

STATE OF NEW YORK,

Petitioner,

v.

SENECA NATION OF INDIANS, TONAWANDA
BAND OF SENECA INDIANS, and
UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether under *Arizona v. California*, 460 U.S. 605 (1983), the claims of the Seneca Nation of Indians and the Tonawanda Band of Senecas may proceed against the State of New York, notwithstanding its Eleventh Amendment immunity, where the United States has intervened and filed identical claims.

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STATEMENT OF THE CASE

The Seneca Nation and the Tonawanda Band of Seneca Indians concur with the Statement of the Case as set forth by the Petitioner. As indicated in the Statement of the Case, the Seneca parties and the United States moved to dismiss the State's appeal in this case for lack of appellate jurisdiction because the requirements of the collateral order doctrine set forth in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144-45 (1993), were not met. A motions panel of the court denied the motions to dismiss, and the Seneca respondents did not seek interim review of this jurisdictional issue. The Seneca respondents bring this issue to the Court's attention now for the sole purpose of meeting their obligation to point out a possible jurisdictional defect in the case.

REASONS TO DENY THE WRIT

I. The Court's Decision in *Arizona v. California* is Controlling

The decision in *Arizona v. California*, 460 U.S. 605 (1983), is dispositive of the issue raised in this case. In its 1983 decision, which has not been overruled or modified, the Court held that the federal judicial power was not enlarged by allowing Indian tribes to intervene in an action in which the United States was a party and had filed claims on its own behalf and on behalf of the tribes. The Court stated:

> Nothing in the Eleventh Amendment "has ever been seriously supposed to prevent a State's being sued by the United States." *United States v.*

> *Mississippi*, 380 U.S. 128, 140 (1965). *See, e.g., United States v. Texas*, 143 U.S. 621, 646 (1892); *United States v. California*, 297 U.S. 175 (1936); *United States v. California*, 332 U.S. 19, 26-28 (1947). The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745, n.21 (1981).

460 U.S. at 614. The Court concluded that the tribes met, at minimum, the requirements for permissive intervention because they would be bound by any judgment issued in the case, and because:

> the Indians are entitled "to take their place as independent qualified members of the modern body politic." [Citation omitted.] Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

460 U.S. at 615.

The courts below correctly relied on *Arizona v. California* in refusing to dismiss the Seneca plaintiffs' claims in these cases. The State of New York concedes here that it does not have Eleventh Amendment immunity as against the United States. It also concedes that the claims of the Seneca Nation and the Tonawanda Band are identical to the claims filed by the United States. Neither does the State dispute the Senecas' certain right under Rule 24 to intervene in the United States' action, were the

Senecas' claims to be dismissed. Under these circumstances, *Arizona v. California* is controlling.[1] *See also Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd on other grounds*, 119 S. Ct. 1187 (1999).

The district courts below, as affirmed by the Second Circuit, correctly held that even if the Senecas' claims are barred by the State's Eleventh Amendment immunity, the Senecas would still be entitled to intervene in the United States' case. The State's argument that it is immune from the claims of the Senecas, notwithstanding that the identical claims will be litigated by the United States, would abrogate Rule 24 of the Federal Rules of Civil Procedure in cases involving state defendants. The State's position

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[1] Contrary to the State's arguments, *Arizona v. California* is not distinguishable from the Seneca cases as one where the tribal claims under consideration were asserted initially by the United States. The case was an original action filed in 1952 to determine relative rights to the waters of the Colorado River. *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964), *supplemental decree entered*, 439 U.S. 419 (1979). In 1977, prior to the entry of the supplemental decree, five Indian tribes moved to intervene in the proceedings in order to oppose entry of the 1979 decree so that they could make additional claims to water of approximately 500,000 acre-feet. 460 U.S. at 611-12. The United States joined in the additional claims some two years later. *Id.* This Court allowed the tribes to intervene permissively under Rule 24 of the Federal Rules of Civil Procedure. *Id.* at 614-15. As quoted above, the Court relied on the well-established principal that the Eleventh Amendment does not bar suits by the United States against states, and held that the judicial power of the court would not be enlarged by granting the tribes intervention where the tribes did not seek to bring new claims or issues.

directly conflicts with *Arizona v. California* and its petition for certiorari accordingly should be denied.[2]

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[2] In a final effort to avoid the obvious import of *Arizona v. California*, the State argues that the *Arizona* decision is limited to original jurisdiction suits because of the Court's reliance in *Arizona* on *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). State's Petition at 19-20. This is not true for two reasons. First, the Court explicitly addressed the Eleventh Amendment issue in *Arizona v. California* and did not limit its discussion to original jurisdiction suits. Second, *Maryland v. Louisiana* represents an expansion of intervention principles to allow third parties to intervene in original jurisdiction actions, not a limitation of intervention to such original actions. *See Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) (holding that a private party's request for leave to intervene in an original jurisdiction action between states is to be denied absent a showing of a compelling individual interest not represented by a state) (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953); comparing Fed. R. Civ. P. 24(a)(2)).

Moreover, the State's quotation of language from the first part of footnote 21 of *Maryland v. Louisiana* is misleading. State's Petition at 20. The quoted language, which responds to Louisiana's argument that the Eleventh Amendment restricts original jurisdiction suits as between states, has no relevance to the intervention issue in this case. However, the second part of footnote 21, which addresses intervention by various entities in the suit, is directly relevant to and clearly supports the Court's holding on intervention in *Arizona*. The Court stated:

> Given that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See Oklahoma v. Texas, 258 U.S. 574 (1922). Cf. Trbovich v. Mine Workers, 404 U.S. 528 (1972).

II. There is No Conflict between *Arizona v. California* and Later Eleventh Amendment Decisions or Other Decisions of this Court

This Court's decision in *Arizona v. California* recognizes and rests on the basic proposition that states are not immune from suits brought by the federal government. 460 U.S. at 614 *citing United States v. Mississippi*, 380 U.S. 128, 140 (1965); *United States v. Texas*, 143 U.S. 621 (1892); *United States v. California*, 297 U.S. 175 (1936); *United States v. California*, 332 U.S. 19, 26-28 (1947). *See Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). Once jurisdiction is established as to the United States' claims against the state, the Court held, third parties may intervene so long as no new claims or issues are raised. 460 U.S. at 614.

Subsequent Eleventh Amendment decisions of the Court have not retreated from the established principles on which *Arizona* rests. In particular, in cases involving Indian tribes and their vital property interests and jurisdiction, tribes have regularly appeared as parties along with the United States in suits involving state defendants, including two cases from this Court's last term. *See, e.g., Minnesota v. Mille Lac Band of Chippewa Indians*, 119 S. Ct. 1187 (1999); *Montana v. Crow Tribe*, 118 S. Ct. 1650 (1998); *In re the General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *aff'd, Wyoming v. United States*, 492 U.S. 406 (1989); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Nevada v. United States*, 463 U.S. 110 (1983); *Montana v. United States*,

450 U.S. 544 (1981). In both *Mille Lacs* and *Crow Tribe*, decided last term, the United States intervened in the suits filed by the tribes against the States of Minnesota and Montana respectively. *Mille Lacs*, 119 S. Ct. at 1195; *Crow Tribe*, 118 S. Ct. 1655-56.[3] Neither the Court nor anyone else suggested that the tribal plaintiffs were not proper parties, notwithstanding that both cases involved state defendants.

The decisions New York cites as modifying or overruling *Arizona v. California* are clearly distinguishable. In *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 250-53 (1985), defendant counties filed cross-claims for indemnity against the State of New York. The tribal plaintiffs had not asserted any claims against New York, and the United States was not a party to the case at all. Because the judicial power of the court would have been enlarged by allowing the separate third-party indemnity claims to proceed under these circumstances, the Court found that the Eleventh Amendment precluded the exercise of ancillary jurisdiction over pendent, non-tribal claims. Similarly, in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court dismissed pendent state law claims brought by third parties where the United States had not brought such claims and lacked standing to do so. 465 U.S. at 103 n.12. The Court held that the presence of the United States did not eliminate the immunity of the state for purposes of the separate state-law claims to which the United States was not a

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[3] In the *Crow Tribe* case, the United States intervened in the suit filed by the Crow Tribe against the State of Montana five years after the case was filed. *Id.*

party.[4] These cases, involving ancillary and pendent claims not brought by the United States, clearly have no application here where, as the State has conceded, the United States and Seneca claims are identical, and the United States' claims will be litigated whether or not the Senecas are parties.

New York also baldly asserts that the United States is something less than a full party to this litigation and that because the requisite exercise of "political responsibility" for the suits is lacking, this case conflicts with the Court's decision in *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."). However, the logical conclusion of New York's argument is not that the Senecas cannot participate in the United States' claims, but that the United States cannot maintain its suit. This hardly squares with the State's concession that the United States' claims are not barred by the Eleventh Amendment.

The State's assertion that the Senecas are controlling the litigation decisions of the United States and its Department of Justice in the present cases is wholly

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[4] Specifically, the Court held in *Pennhurst* that "the United States' presence in the case for any purpose does not eliminate the States' immunity for all purposes." *Id.* However, even in *Pennhurst*, the United States' presence eliminated the States' immunity for purposes of the claims brought by the United States. Thus *Arizona* and *Pennhurst* are entirely consistent in this regard.

unsupported. The State's objections amount to nothing more than complaints about the United States' decision to intervene in the present cases. New York has conveniently forgotten that the United States has a trust responsibility to Indian tribes to protect their property interests. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). Participation by the Senecas in the United States' claims in these cases no more "denigrates the dignity and respect" of the states, State's Petition at 17, than does the filing of the United States' claims. New York's complaints about the United States' litigation decisions do not provide a legal basis to invalidate intervention principles merely because the defendant is a state.

Nor is this a case where the United States has delegated its exemption from Eleventh Amendment immunity to the Senecas. *See* State's Petition at 17, *citing United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999), *supplemental opinion*, 173 F.3d 890 (D.C. Cir. 1999) (Eleventh Amendment did not bar qui tam relator from maintaining False Claims Act claim against the state), *petition for cert. filed*, 68 U.S.L.W. 3116 (Aug. 2, 1999) (No. 99-213).[5] The United States is a full party in these cases, and the Second Circuit has made

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[5] *See also United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (June 24, 1999) (No. 98-1828). *But see United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars False Claims Act qui tam suit against a state in federal court), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999) (No. 99-321), *petition for cert. filed*, 68 U.S.L.W. 3153 (Aug. 27, 1999) (No. 99-365); *United States v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (same).

clear that the State retains its Eleventh Amendment immunity to the extent the Senecas attempt to raise new claims or issues. *Seneca Nation of Indians v. State of New York, et al.*, 178 F.3d 95, 97 (2d Cir. 1999) (citing *Arizona v. California*, 460 U.S. at 614) (State's Appendix 1a, 5a). The State's immunity is thereby fully protected.

In filing its petition, New York seeks nothing less than the nullification of Rule 24 in cases brought against it by the United States. No decision of this Court or any lower court supports or even suggests such an extreme result. There is no tension between the decision below and any decision of this Court or any other court.

III. The Significance of the Issue in these Cases, If Any, Has Been Eliminated by the Court's Recent Eleventh Amendment Immunity Decisions

New York would have the Court believe that there is a serious ongoing practice in which the United States "employs a tactic" of intervening at the last minute to "resuscitate Indian actions against the States." State's Petition at 22. If left unchecked, according to New York, this practice will severely "curtail the States' Eleventh Amendment immunity." *Id.* This plea ignores the practical effect of recent Supreme Court decisions in cases involving claims against states.[6]

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[6] To the extent the State's plea suggests a timeliness problem, this is resolved by reference to Fed. R. Civ. P. 24. The courts below correctly determined that the United States' claims were timely and the United States was otherwise entitled to intervene in the cases. Moreover, the United States' alleged motivation (to resuscitate the claims, according to the State) is not a relevant factor under Rule 24. In short, the timing of the

In recent years, the Court has decided cases that dramatically curtail tribes' ability to sue states directly without the participation of the United States. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991). These cases ensure that the issue of state sovereign immunity will be addressed by the courts at the earliest stages of any litigation in which a tribe or other party asserts claims against state defendants. Failure of the United States to appear as co-plaintiff or promptly assert its claims would risk the dismissal of the claims on the state defendants' first motions to dismiss. As a practical matter, there are likely to be few if any cases filed by Indian tribes against states without the United States' participation at the outset.

Finally, the cases here were filed in 1985 and 1993, before the Court's defining Eleventh Amendment decisions above.[7] The same is true for every pending Indian land claim case in New York, *see Cayuga Indian Nation of New York v. Pataki*, 80-CV-930, 80-CV-960 (N.D.N.Y.) (filed in 1980); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (filed in 1974); *St. Regis Mohawk Tribe v. State of New York*, 82-CV-783, 82-CV-1114, 89-CV-829 (N.D.N.Y.) (filed in 1982 and 1989); *Stockbridge-Munsee Community v. State of New York*, 86-CV-1140 (N.D.N.Y.) (filed in 1986), as well as *Mille Lacs Band of*

United States' intervention does not implicate New York State's Eleventh Amendment immunity.

[7] The second Seneca case was filed after *Blatchford*, but before *Seminole* and *Coeur d'Alene*.

Chippewa Indians v. Minnesota, 124 F.3d 904, 910 (8th Cir. 1997) (filed in 1990). *See* State's Petition at 22. The significance of the issue raised here by defendant State – tribal plaintiffs' ability to assert their previously filed claims against states after United States' intervention – has been eliminated by *Blatchford*, *Seminole* and *Coeur d'Alene*.

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 15, 1999.

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No. 99-269

IN THE
Supreme Court of the United States

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

SENECA NATION OF INDIANS AND
UNITED STATES OF AMERICA,

Respondents.

STATE OF NEW YORK,

Petitioner,

v.

SENECA NATION OF INDIANS, TONAWANDA BAND OF SENECA
INDIANS, AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTERESTS OF THE *AMICI*

The *Amici* States have a substantial interest in the proper interpretation and application of the Eleventh Amendment. This case presents an Eleventh Amendment issue of substantial importance to the States—whether the mere intervention of the United States in an otherwise private suit circumvents a State's immunity from suit by the private parties in the case. Although the Court long has recognized that the United States may sue a State in federal court, including by filing an original action in this Court, the Court has yet to undertake a thorough examination of this question.

With this Court's recent state sovereign immunity decisions, *e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); and *Alden v. Maine*, 119 S. Ct. 2240 (1999), emphasizing the States' constitutionally grounded immunity from suits in either federal or state courts for alleged violations of federal law, private parties may seek ways to circumvent the States' immunity. The Court's recent opinion in *Alden v. Maine* itself acknowledges that the States do not have immunity from suits by the United States to enforce federal law. Of course, the States are not challenging the propriety of that doctrine, but it does not follow that private parties that have an interest in such litigation may participate in the case as adverse parties to the State with the right to conduct discovery, file motions, and participate in any trial of the matter. Such a result would undermine the purpose of the States' constitutional immunity—preventing States from being subjected to coercive judicial process without their consent at the instigation of private parties.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S ELEVENTH AMENDMENT HOLDING IN *ARIZONA v. CALIFORNIA*, 460 U.S. 605 (1983), IS PROBABLY WRONG AND SHOULD BE RECONSIDERED

The decision critical to the Second Circuit's ruling in this case is this Court's opinion in *Arizona v. California*, 460 U.S. 605 (1983), an original action involving a multi-State dispute over the water of the Colorado River. Relatively early in the litigation, the United States intervened in the case to represent the interests of various Indian tribes that held land along the river. Twenty-five years after the suit was commenced, several tribes themselves sought to intervene and participate in the litigation. In a single paragraph, the Court dismissed the States' Eleventh Amendment objection to the tribes' intervention. *See* 460 U.S. at 613-14. With all due respect, for the reasons set forth below, the Court's perfunctory analysis on this important constitutional question was probably wrong and merits reconsideration.

A. The Circumstances The Court Addressed In *Arizona v. California* Were Unique And The Court's Perfunctory Discussion Of The Eleventh Amendment Issue Is Unpersuasive

In *Arizona v. California*, 460 U.S. 605 (1983), this Court did not address, nor have any reason to consider, the type of Eleventh Amendment issues that may arise today when the United States seeks to intervene in a private lawsuit for the purpose of defeating a State's claim of immunity. As New York has explained, several factors distinguish the present case from the situation in *Arizona v. California*, and the *Amici* States will not repeat that discussion. Indeed, at a minimum, the unique circumstances in *Arizona v. California* alone provide a basis for strictly limiting the Court's Eleventh Amendment holding to the facts of that case.

Moreover, the Court's reasoning in rejecting the States' Eleventh Amendment argument in *Arizona v. California* is both perfunctory and unpersuasive. Beginning with a cryptic footnote, *see* 460 U.S. at 614 n. 4[1], the Court assumed "arguendo that a State may interpose its immunity to bar a suit brought against it by an Indian tribe," *id.* at 614, and then reasoned that any such immunity was lost when the United States intervened and asserted water rights on behalf of the tribes. *Id.* In the Court's view, the tribes did "not seek to bring new claims or issues against the states" and, thus, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* That was the sum total of the Court's Eleventh Amendment analysis.

B. The Court's Subsequent Decisions Confirm That The Eleventh Amendment Holding Of *Arizona v. California* Is Suspect

With all due respect, the Court's analysis in *Arizona v. California* does not withstand scrutiny in light of this Court's subsequent state sovereign immunity decisions. First, the Court no longer has to assume "arguendo" that a suit by a tribe against a State is subject to the restrictions imposed by the state's constitutionally grounded immunity. It is. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

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[1] Justice White in footnote four declared that "[t]here are suggestions in the papers that the states' sovereign immunity is in some respect distinct from the immunity afforded by the Eleventh Amendment." 460 U.S. at 614 n. 4. Nonetheless, he concluded that "[i]nsofar as the question of intervention posed here is concerned, we appreciate no such difference." *Id.* This Court's recent decision in *Alden v. Maine*, 119 S. Ct. 2240 (1999), of course, clarifies that the States' constitutionally grounded sovereign immunity is inherent in the Constitution's structure and that the Eleventh Amendment *confirms* rather than *establishes* that immunity.

(1996); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Second, the Court has expressly held that state sovereign immunity, like the personal immunities of individual government officials sued for money damages, is an *immunity from suit*. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The States' immunity is not simply an ultimate defense to liability, to be asserted at trial or at the summary judgment stage following potentially burdensome, tedious and costly discovery proceedings. To the contrary, when the immunity exists, it should terminate the suit at the earliest possible stage of the litigation, generally before the State is subjected to burdens of discovery and trial. This immunity should apply to each and every "suit" brought against nonconsenting states by private parties. The immunity should not be lost with respect to all "suits" merely because one of the plaintiffs (the United States) is not restricted by the State's immunity.

Thus, another error of *Arizona v. California* is the assumption that permitting private parties to participate in the proceedings, once the United States is already present, in no way adds to the costs and burdens of the litigation. The result does not depend upon whether the additional private parties actually assert their own claims against the State or, if so, whether those claims differ from the claims of the United States. Rather, the burden on the States is present irrespective of those considerations, and the intrusion on the States' constitutionally grounded immunity no less significant.

In fact, permitting private parties to intervene or remain in the litigation in a case like this creates a serious potential for drastically limiting the States' sovereign immunity. For, if the United States may lend its name to litigation but rely upon the private parties to conduct the proceedings and bear the costs of litigation, there is less incentive for the United States to make serious assessments about the importance of the litigation to

the federal government and the costs to the federal sovereign of participating. In this respect, this case raises issues similar to those arising in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (cert. granted June 24, 1999), the *qui tam* case brought under the False Claims Act in which one question is whether a private citizen technically acting in the name of the United States can overcome a state's Eleventh Amendment immunity.

Finally, as New York explains in its Petition for a Writ of *Certiorari*, the Court's decision in *Arizona v. California* that the tribes' presence would not enlarge the claims or issues contravenes later decisions expressly holding that there is no "pendent party" jurisdiction in the Eleventh Amendment context. Indeed, "[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 251 (1985). Thus, "[a]lthough the Eleventh Amendment does not bar the United States from suing a State in federal court, the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes." *Pennhurst State School & Hospital v. Haldeman*, 465 U.S. 89, 103 n. 12 (1984).

C. The Court Should Reconsider *Arizona v. California* And Either Overrule Its Eleventh Amendment Holding Or Limit That Holding To That Case's Unique Facts

This Court's subsequent decisions largely undermine the rationale of *Arizona v. California*. Moreover, that case presented unique circumstances, including the fact that it was an *original* action. In light of these considerations, the Court should grant New York's Petition for a Writ of *Certiorari* and reconsider the Eleventh Amendment holding of *Arizona v. California*. With all due respect, the *Amici* States assert that the Court's holding was wrong and should be overruled. In the

alternative, and at a minimum, *Arizona v. California* should be strictly limited to its facts, applying only in original actions.

D. This Important, Unsettled Eleventh Amendment Issue Has Implications Far Beyond Suits Brought Against States By Indian Tribes

The phenomenon of intervention by the United States in order to defeat a State's claim of immunity is not limited to cases involving Indian tribes. For instance, private plaintiffs recently filed suit in federal court against the State of Kansas, challenging the legality of the Kansas school finance system under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Robinson v. Kansas*, No. 99-1193-JTM (D. Kan. filed May 21, 1999). The State of Kansas asserted its Eleventh Amendment immunity in its motion to dismiss the case. Before the court resolved the issue, the United States Department of Justice moved to intervene. Significantly, the United States did *not* take a position on the *merits* of the plaintiffs' claims but, instead, primarily addressed the State's Eleventh Amendment immunity. While the very intervention of the United States will defeat the State's immunity from any claims brought by the United States itself, the important, unsettled question is whether the private parties may remain in the case and participate in the proceedings, assuming the State would otherwise have immunity from their claims.

If the States' immunity to private suits will be overcome whenever the United States lends its name to otherwise private litigation, the States can expect such a tactic to be used with some frequency. On the other hand, if a federal court's jurisdiction over the private party claims must be tested as to each "suit" brought by each party, the United States itself would be forced to actually take over and conduct the litigation in which it intervenes in order to defeat the States' immunity with respect to otherwise private claims, with no participation by the private parties. In those circumstances, intervention

would become more costly and time consuming, requiring the United States to carefully assess such intervention decisions. The proper resolution of this issue is of critical importance to the States, making this case worthy of the Court's attention.

II. ALTERNATIVELY, BECAUSE THE VERMONT *QUI TAM* CASE CURRENTLY ON THE COURT'S PLENARY DOCKET, *VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES*, No. 98-1828, RAISES SIMILAR ISSUES REGARDING THE LEGAL EFFECT OF THE UNITED STATES' INVOLVEMENT, OR LACK THEREOF, IN A SUIT AGAINST A STATE, THE COURT SHOULD HOLD NEW YORK'S PETITION PENDING RESOLUTION OF THE VERMONT CASE

As an alternative to an immediate grant of this case, and at a minimum, the Court should hold New York's petition for disposition pending the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, which may be argued as early as December 1999. In that case, a private citizen brought a federal *qui tam* suit[2] against a state agency under the federal False Claims Act ("FCA")[3] in

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[2] A *qui tam* suit is one that is, in theory, on behalf of the sovereign, but which private citizens are authorized to bring in the government's name. In the False Claims Act context, the statute provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). The sovereign has the authority to exercise significant control over the litigation, if it so desires, and will receive the lion's share of any recovery, although the *qui tam* plaintiff also is entitled to a share of any damages. *See, e.g.*, 31 U.S.C. § 3730(d).

[3] *See* 31 U.S.C. § 3729(a) (imposing civil liability on "[a]ny person who makes a false monetary claim to the United States Government"). In this

federal court. The state agency defendant moved to dismiss the suit on, *inter alia*, the ground that the suit is barred by the Eleventh Amendment. The Second Circuit concluded that, because the plaintiff in a *qui tam* suit in theory steps into the shoes of the United States (which can sue States in federal court without triggering the Eleventh Amendment's protections) and sues on its behalf, the Eleventh Amendment is not a bar to the suit.[4]

There is a strong parallel between the Eleventh Amendment issues that case raises and the Eleventh Amendment issues New York raises in its Petition for a Writ of *Certiorari* here. Both cases involve the effect of the United States' presence or name in litigation initiated by private parties and that would otherwise be barred by the States' constitutional immunity, absent the involvement of the United States. If in the Vermont case the Court concludes that *qui tam* suits in which the United States declines to play the controlling role are barred by the Eleventh Amendment, then the Second Circuit's decision in the New York case will be even less supportable, and this Court's decision in *Arizona v. California* will be even more anomalous.

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case, the allegation is that the defendant state agency, which received federal grants administered by the Environmental Protection Agency for purposes of implementing provisions of the Clean Water Act and the Safe Drinking Water Act, misused those funds to pay salaries of state employees for work not actually involving the federal water statutes. *See United States v. Vermont Agency of Natural Resources*, 162 F.3d 195, 198 (2d Cir. 1998) (describing allegations of complaint), *cert. granted, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (June 24, 1999).

[4] 162 F.3d at 201-03. The Second Circuit also rejected the state agency's argument that a state is not a "person" within the meaning of the False Claims Act. That issue, too, is before the Court and could provide a non-constitutional basis for ruling in the State's favor in the case.

At a minimum, the Court should hold New York's petition for disposition following the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in New York's Petition for a Writ of *Certiorari*, the Petition should be granted immediately or, in the alternative, held for disposition pending the Court's decision this Term in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

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No. 99-269

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

SENECA NATION OF INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a suit originally brought against a State by an Indian Tribe, the Eleventh Amendment precludes the Tribe's continued participation as a party after the United States has intervened as a plaintiff.

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STATE OF NEW YORK, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 178 F.3d 95. An opinion of the district court in the Cuba Lake case (Pet. App. 9a-44a) is reported at 26 F. Supp.2d 555. An order of the district court in the Grand Island case (Pet. App. 57a-60a) adopting the magistrate judge's report and recommendation (Pet. App. 45a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 16, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from two consolidated actions (the Cuba Lake and Grand Island cases) to enforce the restrictions of the Trade and Intercourse Act, 25 U.S.C. 177, which prohibits and renders void any purchase or other acquisition of land from an Indian Tribe without the approval of the United States. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 232 (1985). The suits were filed in 1985 and 1993, respectively. Respondent Seneca Nation (Nation) filed both the Cuba Lake and Grand Island suits, asserting that the State of New York had acquired tribal land without the requisite congressional approval, rendering the transactions void. Respondent Tonawanda Band of Indians (Band) intervened in the Grand Island case. In 1998 the United States was granted leave to intervene in both cases in support of the Nation and the Band (collectively, the Tribes).

Despite the intervention of the United States, petitioners asserted that the Eleventh Amendment bars the Tribes from continuing to participate as parties. The district courts in both cases rejected that contention. Pet. App. 20a-23a, 51a-53a, 59a. Petitioners filed interlocutory appeals of those orders, and the court of appeals affirmed. *Id.* at 1a-5a.

1. a. The Nation filed the Cuba Lake suit in 1985. The complaint alleged that the State had violated the Trade and Intercourse Act by acquiring (through its power of eminent domain) approximately 50 acres of land (subject lands) reserved to the Nation by the United States. Pet. App. 13a. Although the suit was filed in 1985, the parties did not file cross-motions for summary judgment until August 1994. See *id.* at 12a. The proceedings were stayed in 1996, prior to a

decision on the summary judgment motions, pending this Court's resolution of *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Pet. App. 12a. In July 1997, the district court issued a supplemental briefing schedule for summary judgment motions. *Ibid.* In August 1997, the United States filed a motion to intervene on behalf of the Nation and a motion for summary judgment. *Ibid.* The district court granted the United States' motion to intervene in January 1998. *Ibid.*

The district court subsequently issued an order granting the plaintiffs' motion for summary judgment on liability and denying the defendants' cross-motion for summary judgment. Pet. App. 9a-44a. The court first held that the Eleventh Amendment does not bar the Nation's continued participation in the suit. *Id.* at 20a-23a. It explained that the Eleventh Amendment does not apply to suits by the United States. *Id.* at 20a-21a. In light of the intervention by the United States, the court determined, the Nation's continued participation "does not further compromise the State's sovereign immunity." *Id.* at 23a. The court further held that the State's acquisition of the subject lands violated the Trade and Intercourse Act. *Id.* at 40a. The damages phase of the case continues in the district court.

b. The Grand Island suit was filed by the Nation in August 1993. The Nation alleged that more than 18,000 acres of land purchased by the State in 1815 were acquired in violation of the Trade and Intercourse Act. The Band intervened in the suit as a plaintiff. Pet. 6-7.

In August 1996, the State moved to dismiss the Tribes' claims based on the Eleventh Amendment. Pet. App. 46a. The following month, the magistrate judge stayed the proceedings pending this Court's decision in *Coeur d'Alene*. *Id.* at 46a-47a. Following the decision in *Coeur d'Alene*, the Tribes sought and were granted

leave to amend their complaints. *Id.* at 47a. The State subsequently refiled its motion to dismiss the Tribes' complaints on Eleventh Amendment grounds. *Ibid.*

The United States sought leave to intervene in March 1998. Pet. App. 47a. The court granted that motion the following month. *Ibid.* In May 1998, the defendants moved to dismiss the United States' complaint on the ground that the statute of limitations in 28 U.S.C. 2415 precluded the action. Pet. App. 47a-49a. Although Section 2415 does not apply to "an action to establish the title to, or right of possession of, real or personal property," 28 U.S.C. 2415(c), the defendants argued that because the United States did not expressly seek ejectment or a declaratory judgment in its prayer for relief, the action was solely a claim for damages and was therefore barred by the limitations period (six years plus 90 days) set forth in Section 2415(b). Pet. App. 49a.

The district court adopted the recommendation of the magistrate judge (Pet. App. 45a-54a) and denied the defendants' motion to dismiss. The court rejected the defendants' argument that the statute of limitations provided a complete defense against the United States' claims,[1] and it denied the State's motion to dismiss the Tribes' complaints based on the Eleventh Amendment. See *id.* at 58a-59a. The court did, however, "require the United States to file an amended complaint-in-intervention which clearly states the relief being sought * * * in this action." *Id.* at 59a. The United States subsequently filed an amended complaint seeking a declaration that the Tribes have a right to possession of

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[1] The court referred to the magistrate judge the question whether "the statute of limitations * * * bars or limits the recovery of money damages by the United States." Pet. App. 59a.

the subject lands; damages; ejectment against the State; and all other remedies that are just and proper. See United States' First Amended Complaint in Intervention, *Seneca Nation* v. *New York*, No. 93-CV-0688A (W.D.N.Y. Dec. 18, 1998). The liability phase of the case continues in the district court.

2. The State filed interlocutory appeals from both district court orders. The court of appeals consolidated the appeals and "affirm[ed] the orders of the district court denying the State of New York's Eleventh Amendment defenses." Pet. App. 4a-5a. The court "note[d] that the State of New York retains its Eleventh Amendment immunity to the extent that the [Tribes] raise claims or issues that are not identical to those raised by the United States." *Id.* at 5a (citing *Arizona* v. *California*, 460 U.S. 605, 614 (1983)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The Eleventh Amendment does not bar the United States from bringing an action in federal court against a State. See, *e.g.*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14, (1996); *United States* v. *Mississippi*, 380 U.S. 128, 140 (1965). It is also clear that the United States may bring an action to protect the property interests of federally recognized Indian Tribes and their members. See, *e.g.*, *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 783 (1991) (discussing *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926)). The petition for a writ of certiorari does not contest the United States' right to intervene in these cases or otherwise call into question the government's authority

to pursue the litigation. Rather, petitioners contend that the Tribes' continued participation in these actions violates the Eleventh Amendment.

As the court of appeals recognized (Pet. App. 5a), petitioners' Eleventh Amendment argument is foreclosed by this Court's decision in *Arizona* v. *California*, 460 U.S. 605 (1983). That case involved an original action to determine the respective water rights of Arizona, California, and Nevada in the lower basin of the Colorado River. The United States intervened in the suit to assert water rights for federally reserved lands, including Indian reservations, that are dependent on the Colorado River for their water. *Id.* at 608-609. The Special Master granted five Tribes leave to intervene and subsequently found that the Tribes were entitled to additional water rights. *Id.* at 612-613. The States filed objections to the Special Master's report, including an objection that "the Tribes' participation violates the Eleventh Amendment." *Id.* at 614.

This Court rejected the States' Eleventh Amendment argument. The Court "[a]ssum[ed], *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe." *Arizona* v. *California*, 460 U.S. at 614.[2] The Court held, however, that in light of the United States' participation in the suit, "the States involved no longer may assert that [Eleventh Amendment] immunity with respect to the subject matter of this action." *Ibid.* The Court explained:

> The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate

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[2] The Court has since held that the States retain their Eleventh Amendment immunity in suits brought by Indian Tribes. *Blatchford*, 501 U.S. at 779-782.

> in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Ibid.

The rationale of *Arizona* v. *California* is equally applicable to cases, such as these land claims, in which the United States has intervened in an action initially brought by Tribes. See Pet. App. 22a, 53a. The court of appeals' decision in this case is correct and is consistent with the ruling of the only other court of appeals that has addressed the question. See *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 124 F.3d 904, 912-913 (8th Cir. 1997), aff'd on other grounds, 526 U.S. 172 (1999)[3]; Pet. 10 n.2.[4]

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[3] The State of Minnesota did not seek review in this Court of the Eighth Circuit's Eleventh Amendment ruling. See 98-1337 Pet. at i, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, *supra*.

[4] Petitioners suggest that the rule announced in *Arizona* v. *California* should be limited to original jurisdiction cases, on the ground that the Court's decision in that case was "premised on its longstanding practice, apparently undertaken without analysis of the Eleventh Amendment immunity issues involved, of allowing private parties to intervene in original proceedings before the Court." Pet. 20. That argument is without merit. The Court in *Arizona* v. *California* expressly considered and rejected the States' Eleventh Amendment objection to the Tribes' intervention. 460 U.S. at 614. The Court explained that its "judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.* Nothing in the Court's analysis suggests that the propriety of the Tribes' request to intervene depended on the fact that the case fell within this Court's original

2. Petitioners contend (Pet. 14-16) that the decision of the court of appeals is inconsistent with this Court's rulings in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). That contention is without merit.

The private plaintiffs in *Pennhurst* asserted state-law claims for injunctive and monetary relief against state officials. The United States was also a plaintiff in the case. 465 U.S. at 92.[5] The Court rejected the private plaintiffs' contention that "the presence of the United States as a plaintiff * * * remove[d] the Eleventh Amendment from consideration." *Id.* at 103 n.12. The Court explained that

> the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is

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jurisdiction, and nothing in Article III or the Eleventh Amendment supports such a distinction.

[5] Although this Court's opinion in *Pennhurst* does not describe the claims of the United States, the initial court of appeals opinion in the case indicates that the government's complaint was limited to federal-law claims for injunctive relief. See *Halderman* v. *Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 89, 90-92 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981).

unaffected by the United States' participation in the case.

Ibid.

Thus, *Pennhurst* simply makes clear that the presence of the United States as a plaintiff does not affect a State's Eleventh Amendment immunity from private claims *different from* those pursued by the United States itself. Consistent with that principle, the court of appeals in the instant case observed that "the State of New York retains its Eleventh Amendment immunity to the extent that the [Tribes] raise claims or issues that are not identical to those raised by the United States." Pet. App. 5a. But nothing in *Pennhurst* suggests that the Eleventh Amendment bars the Tribes' continued participation as parties with respect to the precise claims advanced by the federal government.

Oneida is even more clearly inapposite. In that case, counties named as defendants in a tribal land suit filed a third-party complaint for indemnification against the State of New York. This Court held that the third-party complaint was barred by the Eleventh Amendment. 470 U.S. at 251. The United States was not a party to the case, however, and the Court therefore had no occasion to consider the application of the Eleventh Amendment to suits in which private parties assert claims identical to those advanced by the federal government.

3. Petitioners contend (Pet. 19) that the principle announced in *Arizona* v. *California* is inapplicable here because the United States intervened in the Cuba Lake and Grand Island cases some years after they were commenced. Petitioners assert that "the litigation remains at the instance and under the control of the tribal plaintiffs who commenced it" (Pet. 19); that the

Tribes "continue to direct the litigation despite the belated intervention of the United States" (Pet. 21); and that "the [Tribes], if they are allowed to continue as parties, will have a substantial and likely dispositive say in the conduct of the litigation against New York, in contravention of New York's sovereign immunity under the Eleventh Amendment" (*ibid.*). Those assertions are without basis.

Because the State retains its immunity with respect to tribal "claims or issues that are not identical to those made by the United States" (Pet. App. 5a), the United States will control the future conduct of this litigation. The Tribes' right to assert the prerogatives of parties (*e.g.*, submitting interrogatories, calling witnesses, etc.) may complicate the litigation to some degree, but the Tribes' participation does not alter the suit's fundamental character as one by the United States, and it does not "enlarge[]" the federal courts' "judicial power over the controversy." *Arizona* v. *California*, 460 U.S. at 614.[6]

The rule that States have no Eleventh Amendment immunity against the United States presupposes that federal officials in their conduct of litigation against

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[6] Taken to its logical conclusion, petitioners' argument could suggest that non-federal parties may not appear even as amici curiae in suits by the United States against a State, since the process of responding to arguments made by an amicus curiae will complicate the litigation to some degree. If (as we assume) petitioners' theory does not sweep so broadly, the practical effect of their position would be to constitutionalize the distinctions made in federal rules and practice between the prerogatives of parties and those of amici. In our view, so long as the Tribes do not seek to bring before the court claims or issues not raised by the United States, the precise nature of their participation raises no issue of constitutional dimension.

state defendants will faithfully seek to pursue the national interest. Here the United States intervened to further the national interest in protecting tribal lands and treaty rights that are alleged to have been taken in violation of federal law. Petitioners' argument appears to rest on the implicit premise that the federal officials charged with conducting this litigation have failed and/or will fail to exercise independent judgment with regard to the claims and issues to be presented to the courts below. Petitioners make no effort to defend that proposition, however, which is wholly unsupported either by the United States' conduct of this litigation or by the government's approach to Indian cases generally. This Court "generally accord[s] Government records and official conduct a presumption of legitimacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991), and petitioners have identified no basis for departing from that presumption here.

In addition, petitioners have wholly failed to explain how reversal of the court of appeals' ruling would alleviate the problem that they believe exists. Although petitioners characterize the government's intervention as "belated" (Pet. 21), they do not seek dismissal of the United States' claims. If petitioners were correct in believing that the federal officials responsible for conducting this litigation had placed themselves under the direction of the Tribes, exclusion of the Tribes as additional parties would not reduce the Tribes' effective control over the government's litigation decisions.

4. As the tribal respondents explain (Br. 9-11), the sequence of events that culminated in the United States' intervention in these cases was largely the result of prior uncertainty regarding the ability of Indian Tribes to pursue land claims against unconsent-

ing States. This Court's decisions in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); and *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), have substantially dispelled that uncertainty. The fact pattern presented here is therefore unlikely to recur with any frequency.[7]

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[7] Contrary to the suggestion of the amici States (Br. 7-9), there is no reason to hold the petition in this case pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828 (to be argued Nov. 29, 1999). The question in that case is whether the United States' *failure* to take over the conduct of a *qui tam* suit against a state agency requires that the suit be dismissed on the basis of the Eleventh Amendment. Here, by contrast, the United States *has* intervened to prosecute the suit, and the State retains its immunity from any claims different from those advanced by the government.

The amici States' account (see Br. 6) of the government's filing in *Robinson* v. *Kansas*, No. 99-1193-JTM (D. Kan.), is significantly misleading. Pursuant to 28 U.S.C. 2403(a), the United States intervened in that case to defend the constitutionality of the abrogation of state sovereign immunity under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The government did not contend that its intervention transformed the suit into one brought by the United States. Rather, we argued that the statutory provisions authorizing private suits against state defendants are a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment. See United States' Memorandum in Support of Intervention and in Opposition to Defendants' Motion to Dismiss Concerning the Constitutionality of Title VI and Section 504, at 3, *Robinson* v. *Kansas*, *supra* (filed Sept. 15, 1999). Nothing in our filing in that case suggests that "the States' immunity to private suits will be overcome whenever the United States lends its name to otherwise private litigation" (Amici Br. 6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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